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R. J. Herrnstein

Social Psychology's "Racism"
Byron M. Roth

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Tissue Transplants: The Dilemma of the Body's Growing Value — *Emanuel D. Thorne*

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Still an American dilemma

R. J. HERRNSTEIN

IN THE mid-1980s a group of social scientists, organized as the Committee on the Status of Black Americans, received a commission from the federally chartered National Academy of Sciences and its satellite organizations, the National Research Council and the Commission on Behavioral and Social Sciences and Education. Its task was to "marshall descriptive data on the changing position of blacks in American society since 1940" and to "explore the consequences, anticipated and unanticipated, of public and private initiatives to ameliorate the position of blacks in America." The Committee's research was supported by the Carnegie Corporation, the Ford Foundation, the Robert Wood Johnson Foundation, the Mellon Foundation, the Pew Charitable Trusts, the Rockefeller Foundation, the Sloan Foundation, and the National Research Council (which itself receives the support of numerous public and private granting agencies). The research has culminated in a 600-page final report, published in 1989 as *A Common Destiny: Blacks and*

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American Society[1] and edited by the Committee's chairman, Robin Williams, and the study's director, Gerald David Jaynes. The book was written, its editors note, "45 years after Gunnar Myrdal in *An American Dilemma* challenged Americans to bring their practices into line with their ideals."

A Common Destiny is a serious work that deserves serious study. The Committee responsible for it was composed for the most part of eminent social scientists,[2] and was supplemented by a staff of specialists; it assembled panels of outside consultants and it commissioned still other experts to write essays on various topics. Considering that the book is the product of communal labor, it is remarkable for its clarity, its almost seamless exposition, and its sophisticated handling of large bodies of data. Almost entirely descriptive, it summarizes well the voluminous information on the social, economic, and political status of blacks in America.

A Common Destiny suffers, however, from one crucial failing: in assessing the gaps separating white and black Americans, it obstinately refuses to consider the evidence concerning racial differences at the individual level. On the infrequent occasions when it offers or hints at explanations of the data that it presents, it suggests that the central determinant of black-white relations in America is discrimination—past or present, deliberate or inadvertent—by whites against blacks. I do not assert that racial discrimination is insignificant or tolerable; I do, however, contend that the study wrongly ignores the evidence at the individual level that I discuss here.

Explaining racial differences

In often depressing detail, the book tells how blacks and whites on the average are unequal beneficiaries and casualties of Ameri-

[1]National Academy Press. 608 pp. $35.

[2]Committee members identified in the book were Robin M. Williams, Jr. (sociologist), Hubert M. Blalock, Jr. (sociologist), Lee P. Brown (police chief), John Hope Franklin (historian), James J. Gibbs, Jr. (anthropologist), Bernard R. Gifford (biophysicist), Nathan Glazer (sociologist), Beatrix A. Hamburg (child psychiatrist), Charles V. Hamilton (political scientist), Joel F. Handler (law professor), Robert M. Hauser (sociologist), James S. Jackson (social psychologist), Stanley Lieberson (sociologist), Michael Lipsky (political scientist), Glenn C. Loury (economist), Eleanor Holmes Norton (law professor), Thomas F. Pettigrew (social psychologist), James Tobin (economist), Phyllis A. Wallace (economist), Nancy J. Weiss (historian), William Julius Wilson (sociologist), and Raymond E. Wolfinger (political scientist). Glenn Loury, the book says, stopped participating after June 1987. The study's director, Gerald David Jaynes, is an economist.

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can society. They differ in earnings; they differ in wealth, even after taking account of the difference in earnings; they differ in the quality of their housing; they differ in schooling and in the amount learned in school; they differ in their rates of committing crimes and of being victimized by them; they differ in life expectancy, susceptibility to disease and accident, and infant mortality. In some respects, for example in political participation, progress has been made, as the book notes. White attitudes toward blacks have changed, as the principle of equal opportunity has been generally accepted. But in many other respects, such as in education and economic standing, the large improvements following the civil-rights legislation of the 1960s have not led to further gains; progress toward equality stalled in the mid- or late 1970s, and has now, the book claims, given way to a retreat from equality.

Although inequalities are still evident in statistical averages, whites and blacks in America overlap in every important measure—income, wealth, education, health, and law-abidingness, among others. There are poorly housed, uneducated, and ill cared-for whites in America, just as there are highly successful blacks. Some whites are illiterate; some blacks are erudite. The book documents both the differences separating blacks from whites on the average and the overlapping distributions of white and black accomplishment and standing.

There are two fundamentally different models to explain why populations whose individuals overlap might differ on the average. The public-policy implications depend on the extent to which each model applies. The "discrimination" model focuses on social and institutional practices that discriminate against members of one group (or that favor members of another), undermining the "level playing field" called for by recent American political and legal rhetoric. This model clearly applied in many instances in the past, such as the exclusion of black baseball players from the major leagues prior to 1947 and the barrier against professional military careers for blacks before and during World War II. The educations provided blacks and whites by the South's racially segregated public school systems, which differed vastly in the levels of public support, are a paradigmatic example of racial differences that the discrimination model explains well.

In the discrimination model, equality can come about only when the barriers imposed by society are removed; but when they are removed, equality eventually ensues. The crucial assumption of

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this model is that in the absence of barriers, the groups would be proportionally equal at every level of society. Differing averages are thus *prima facie* evidence of discrimination, whatever the expressed intentions of the society or its record of law and administration; any lingering difference in the proportional representation of the races proves that the society is racist, and justifies "affirmative action" and other restraints on its citizens.[3]

To the limited extent that the book strives to explain the differences that it observes, *A Common Destiny* is rooted in the discrimination model. In its own words: "Black status results from American social institutions and the race relations that have developed within that institutional structure." The book ignores the alternative model, the "distributional" model, which explains the overlapping of the populations and their differing averages by referring to characteristics of the populations themselves.[4] The distributional model understands differences between the races not simply in terms of the different opportunities available to people of different races; it is willing to consider the possibility that the different outcomes are also the product of differing average endowments of people in the two races.

The two models may both be partially correct. Facts exist, or could be found, that may help to account for disparities between the races, whether or not we know or wish to know what they are. Thus the distributional model's adherents would consider possible differences in athletic endowments in explaining the disproportionate presence of black basketball players in the National Basketball Association. Similarly, in accounting for differences in income, education, health, and so on, the model's proponents would examine individual traits that may be distributed differently among blacks and whites; these traits may help to explain both the observed differences in the average and the overlapping distributions at each level of income, education, and the rest.

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[3]The book distinguishes between "segregation," in which there is complete exclusion of a group, and a lack of "integration," when groups are disproportionately represented. The goal of public policy, according to the book, should be integration of blacks and whites—equal proportionate representation—and not merely desegregation. The goal of integration is realized only when "equal status of the races is achieved, common superordinate goals exist for all, and the process has authoritative sanction and support. In the 1980s nearly all institutions in the United States are desegregated; few, if any, are completely integrated in this sense of the term."

[4]To be more precise, the book describes the two models rather well in principle, but then gives the second one no further serious consideration.

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A difference in the average levels of these things would not, according to the distributional model, by itself indict a society of racism. Similarly, the absence of a difference would not disprove charges of discrimination. *Any* average level of attainments could indicate a nondiscriminatory society, provided that it correlated with the underlying distributions of traits. To the extent that the distributional model is correct, affirmative action and other equalizing constraints on people are less moral imperatives than the products of a political judgment.

Differences between blacks and whites are highly controversial, of course; the result is that any consideration of the distributional model (which everyone realizes is the alternative to the discrimination model) is taboo in polite company. *A Common Destiny* frankly states that something like the distributional model is offered by a majority of white (but not black) Americans when asked on surveys to explain black-white inequality. Even so, open discussion of the model is our obscenity, much as public discussion of sexuality was the Victorian obscenity.

Raising the distributional model in public is perilous. It is good form for public figures to proclaim that no effort will be spared to approach proportional representation between the races, whether in the student body or on the faculty, among one's corporate officers or one's political appointees. It is not necessary to prove that black-white disproportions arise from discrimination; indeed, it would be risky to consider any alternative in public. For this reason, it is not surprising that the Committee chose to give short shrift to the distributional model in its report. If the distributional model is our obscenity, the discrimination model is our dogma.

Omissions of evidence

A Common Destiny says almost nothing about differences between blacks and whites on standardized tests of intelligence or cognitive aptitude; what little it says is mostly wrong. No dimension of individual human variation has been measured as often as whatever it is that those tests test. The topic cannot have been omitted because of a scarcity of data.

Blacks and whites cover more or less the same range on aptitude tests, but disproportionately. Relatively more whites score high, and relatively more blacks score low. On average, there is a difference of about one standard deviation between the two populations. In other words, to a first approximation, the average black is

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at the 16th percentile of the distribution of whites on tests of intellectual aptitude; the average white is at the 84th percentile of the distribution of blacks. In absolute numbers, of course, each race has many people throughout the scale, from top to bottom.

The difference in averages has been observed in hundreds of studies, involving thousands upon thousands of people, since objective testing began early in the century.[5] Notwithstanding some vague hints in the book, there is no clear evidence that the gap between the races has been closing recently or that it shrank when the economic gap between the races was shrinking. The legacy of slavery and of past and present discrimination cannot be discounted as a contributor to the racial gap in scores, because its effects might be as profound as they are hard to measure or uproot. But we do not know with any certainty where the difference comes from, or what it would take for it to go away.

Contrary to what one reads in the newspapers or hears on television, tests do not appear to be biased against blacks, insofar as they predict performance in school, on the job, or anywhere else. It is to the authors' credit that they had little enthusiasm for spreading further the distrust of tests. But though earlier studies commissioned by the National Academy of Sciences agreed with experts generally that a given test score has almost the same predictive implications for the performance of a black as for the performance of a white,[6] the authors do not affirm the unbiased predictive power of tests. They simply fail to discuss the issue.

Without discussing IQ scores, the book does disclose evidence of large gaps in the intellectual attainments of the two races. For example, it draws on the National Assessment of Educational Progress (NAEP), a program that monitors the academic achievement levels of the American population in repeated samplings that are designed to be representative. A 1985 NAEP study cited in the

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[5]Summaries and evaluations of the evidence are in John C. Loehlin, Gardner Lindzey, and James N. Spuhler, *Race Differences in Intelligence* (W. H. Freeman, 1975); and R. Travis Osborne and Frank C. J. McGurk, *The Testing of Negro Intelligence, Volume 2* (Foundation for Human Understanding, Athens, GA, 1982).

[6]The earlier reports are Alexandra K. Wigdor and Wendell R. Garner (eds.), *Ability Testing: Uses, Consequences, and Controversies* (National Academy Press, 1982); and John A. Harti gan and Wigdor (eds.), *Fairness in Employment Testing: Validity Generalization, Minority Issues, and the General Aptitude Test Battery* (National Academy Press, 1989). (For a discussion of Hartigan and Wigdor, see the essay by Jan H. Blits and Linda S. Gottfredson that follows this article.) A definitive treatment of the subject of test bias can be found in Arthur R. Jensen's *Bias in Mental Testing* (The Free Press, 1980).

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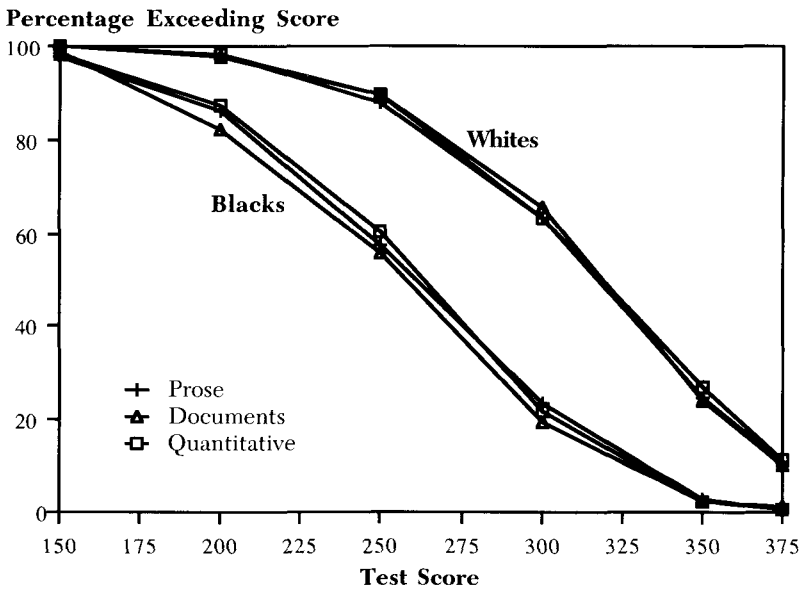
book compared the "functional literacy" levels of national samples of blacks and whites aged twenty-one to twenty-five. The study used three scales to assess competence with prose, documents, and quantitative materials. Each scale measured performance on simulations of everyday activities—understanding newspapers; making sense of documents like pay stubs, bus schedules, and maps; balancing a checkbook; and so on. The scales, ranging from 0 to 500, each had national averages of slightly above 300 and standard deviations of 50. The following figure, adapted from a table in the book, gives the results:

Figure: NAEP Results



Though the book does not reveal distributions above 375, we can infer from the figure that most of both populations scored between 150 and 450, within approximately three standard deviations of the general average. Blacks covered essentially the same range as whites, but their distribution was consistently shifted downward. For example, the figure shows that on each of the scales approximately 90 percent of the white population exceeded 250, but that only about 60 percent of blacks did; about 64 percent of the whites exceeded 300, but only about 22 percent of blacks did so. (On the prose scale, the 250 level represents the capacity to glean some information from a newspaper sports story or to find an intersection on a road map; to reach the 300 level, one must be

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able to find a route to a given location on a map, to balance a checkbook, or to extract somewhat more complex information from a news article.) Despite the different tasks measured by the three scales, the distributions were notably uniform within each race; the average gap between races was consistently 50 to 60 points, which is to say 1 to 1.2 standard-deviation units, or just slightly larger than the historic IQ difference between the two populations.

As the book notes, even if one takes account of such background variables as parental education and occupation, high school curricula, and some measure of educational attainment, the difference between the races' average scores is reduced only from about 1 or 1.2 standard-deviation units to about .8 or .9 standard-deviation units (that is, 40 to 45 points, rather than 50 to 60).[7] Other data, some of them mentioned in the book, lend support to the impression that there are intractable race differences in the performance of cognitively demanding tasks.

Intelligence and economic status

The book occasionally attributes the black population's low average academic skills to its low average economic standing. Thus it falls victim to the all-too-familiar logical error of thinking that the correlation between economic status and intelligence proves that status causes intelligence; it would be just as plausible to say that intelligence determines status, and most plausible to claim that from generation to generation the lines of causality run in both directions simultaneously (with intelligence contributing to eventual status and vice versa).

Evidence not presented in the book indicates that within each race, variations in status explain little of the variance in tested intelligence.[8] In other words, at each socioeconomic level there are wide and overlapping distributions of test scores. This pattern suggests—though it does not prove—that the difference in the races' average socioeconomic status may not in and of itself account for much of the gap in the average scores.

[7]And even this reduction is ambiguous about the direction of causation; a family's cultural background or a child's educational attainments may be correlated with the child's cognitive capacities without causing them.

[8]The evidence for this statement is scattered in many empirical studies, but a secondary source for it is Arthur R. Jensen's *Straight Talk About Mental Tests* (The Free Press, 1981).

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Indeed, the reverse may to some extent be true. The productivity of workers in America today is correlated with their tested intelligence, as measured on conventional IQ tests or other comparable gauges of aptitude, such as the federal government's General Aptitude Test Battery. The more demanding an occupation is cognitively, the higher the correlation between productivity and tested intelligence; even in the most routine and undemanding jobs, however, intelligence matters.

The two recent studies commissioned by the National Academy of Sciences cited above accept this correlation, but disagree on how significant it is for the economy as a whole. The two studies agree, however, that the difference in tested aptitude is an important factor in the different economic conditions and prospects that confront blacks as compared with whites. The present book does not mention either of those earlier studies; it also ignores the scientific literature with which they grapple.[9] Nonetheless, no individual trait predicts as much about one's personal destiny in America as test scores.[10] Given the hypothetical choice of being black with an IQ of 120 or white with an IQ of 80, one should choose the former to get ahead in America now or in the readily visible future.

Of all the things that test scores predict, they predict success in school best. And because educational attainment has become increasingly important in determining a person's ability to make a decent living, it follows logically that IQ scores are increasingly predictive of general success. The book does not discuss the implication that the importance of tested intelligence is growing. It does, however, do a good job of documenting the increasing importance of education in earning a living:

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[9]See, for example, Linda S. Gottfredson's article "Societal Consequences of the *g* Factor in Employment," 29 *Journal of Vocational Behavior* 379-410 (1986). Gottfredson draws on an influential program of research by industrial psychologists and others (prominently including John Hunter of Michigan State University and Frank Schmidt of the University of Iowa) dealing with the relation between intelligence test scores and economic productivity. Gottfredson has specifically addressed this relation's implications for racial differences in occupational status.

[10]That fact probably has a good deal to do with the unpopularity of tests: if, say, 90 percent of people are disappointed with their own or their children's scores (and given the pressures created by elite schools and the like, that is not too large a percentage), small wonder that people would rather be told that the scores are meaningless. And small wonder that no shortage of commentators has been ready and willing to tell them just that. For a comparison of the gulf between what is said in the technical literature about the validity and meaning of test scores and what is said in public, see Mark Snyderman and Stanley Rothman's *The IQ Controversy: The Media and Public Policy* (Transaction Books, 1988).

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> A generation ago, a low-skilled man had relatively abundant opportunity to obtain a blue-collar job with a wage adequate to support a family at a lower middle class level or better. Today the jobs available to such men—and women—are often below or just barely above the official poverty line for a family of four.... Obtaining a well-paying job increasingly requires a good education or a specific skill.

Later the book clearly shows that earnings disparities, which have increased nationally for a generation, are increasing more rapidly among blacks than among whites. An increasing fraction of the black population is falling out of the legitimate labor market entirely—perhaps because the economic results of its efforts are so discouraging.

The report suggests that intellectual ability can be significantly elevated by improvements in early home environment. This hypothesis seems plausible, and it is probably valid under some conditions. Nonetheless, the studies on which the book relies—involving transracial adoptions—have not convincingly eliminated much if any of the racial gap in test scores. The few studies that claim that they have are cited, but the testing community's skepticism toward them is neither evaluated nor mentioned.

Head Start programs for youngsters evidently have various good effects on later performance (in school and in general), but the evidence at hand indicates that they do little or nothing in the long term for measured intellectual ability. Other educational interventions have had only small lasting effects on tested intelligence. Schools are not to blame for the black-white differences in test scores: most if not all of the difference in national averages already shows up in the intelligence tests that children take when they begin school at the age of about six.

A Common Destiny mentions a few studies that may eventually lead to educational improvement. As the book recognizes, some teachers teach more effectively than others, but they are not necessarily those who have taken the most education courses or who have other objective credentials. Good teaching remains somewhat mysterious. Some classrooms or schools appear to create a better climate for learning than others. The most effective education occurs with a stable faculty, a safe school, strong leadership from the administration, support from families, a serious emphasis on course content, and a willingness to condemn the bad academic work as well as to praise the good.

Having made these points, the book then neglects to point out that improving schools would not necessarily lessen the gap

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between blacks and whites. Nothing in the data indicates that the observed differences between the races are to any large extent explained by these variables; as far as we know, black and white children would profit equally from improvements in teacher effectiveness, school ambiance, and the like. Still, improving our schools is presumably desirable even if doing so would merely raise the average level of intellectual performance and leave the black-white gap largely intact.

Or is it? Here political as well as moral choices come into play. How much are we as a society willing to pay to try to equalize the races by benefiting the children of one race and not the other, even if the distributional model partially explains the observed differences between them? I myself would be willing to pay some amount, but I have only one vote. The public must provide the answer, but scholars are responsible for providing it the best relevant information available. Regrettably, *A Common Destiny*, like so many other scholarly and political discussions, is committed to the discrimination model—by default if not explicitly. It barely hints that the distributional model could play any role—let alone an important one—in explaining the gap between the races.

Crime, health, and housing

The book's discussions of other topics also ignore the possibility that distributional differences and not just discrimination might account for the observed differences between the races. After raising the question whether biases in the criminal-justice system might account for the differences between black and white rates of arrests, convictions, and imprisonments, the book concludes that there is a genuine, large, and growing disproportion in *crime* rates: blacks are increasingly more likely to break the law than whites. This is what most other studies of the subject now assert.

But then—virtually without supporting evidence—the book makes a claim that is far more common in the popular media than in the scholarly literature: "As long as great disparities in the socioeconomic status of blacks and whites remain, blacks' relative deprivation will continue to involve them disproportionately in the criminal justice system as victims and offenders." If this is so, the relative deprivation of blacks must have grown in the United States from 1939 to 1985, since the proportion of black prisoners in those years rose from 26 percent to 46 percent of the total prison population. But *A Common Destiny* itself notes that relative deprivation

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decreased during that period.

The chapter on crime simply does not consider evidence that may support the distributional model's analysis of the racial difference in crime rates. There is, for instance, evidence showing that tested intelligence and other individual psychological traits are among the primary predictors of criminal behavior. Other evidence indicates that socioeconomic status and unemployment are by comparison weak predictors.[11]

Scholars cannot yet explain why the rise in crime rates seems to be concentrated among those with particular individual traits. Some scholars have tried to account for those individual traits in terms of sociological forces—as the results of poverty or discrimination, for example—but they have not succeeded. In any event, unlike the authors of *A Common Destiny*, most scholars at least acknowledge the ostensible power of individual traits in predicting criminality.

The same neglect continues through the book. In discussing health, the book conscientiously reviews the evidence of the disadvantages that blacks face. Mortality rates are higher for blacks than whites; blacks suffer from AIDS, alcoholism, hypertension, and other diseases at higher rates than whites; among young males in 1984, the homicide rate for blacks was more than five times the rate for whites. The infant-mortality rates of American blacks are twice those of American whites; in fact, they are higher than the rates in Bulgaria, Cuba, Greece, Israel, or any other country cited in the book. What is more, the book notes, the gap between black and white infant-mortality rates in America is widening.

But the discrimination model does not necessarily explain these differences. The homicide rates among blacks doubtless reflect black criminals' disproportionate victimization of other blacks—a connection that the book does not make explicit. The book also ignores the possibility that distributional variables may play some role in causing other risks to life and health that have behavioral components, such as AIDS.

The most relevant explanatory variables for infant-mortality rates, for instance, include educational levels, maternal age, mari-

[11] These things are summarized and discussed in, for example, James Q. Wilson and Richard J. Herrnstein's *Crime and Human Nature* (Simon & Schuster, 1985) and the collection of essays edited by Wilson under the title *Crime and Public Policy* (ICS Press, 1983), as well as in a good many other primary and secondary sources—none of which is cited or mentioned in *A Common Destiny*.

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tal status, the incidence of maternal anemia, and the incidence of various sorts of substance abuse. As the book acknowledges, studies have not found that ethnicity, *per se*, is a significant predictor of infant mortality. Instead, as the book also acknowledges, the infant-mortality differential (as well as other differentials concerning major threats to health and survival) seems to stem from behavioral differences. Nevertheless, in summarizing its chapter on health, the book concludes:

> A common hypothesis is that the difference is mainly due to the higher proportion of blacks in lower income groups. This is a plausible argument based on the well-known association between income and health.... The data suggest that black Americans are at a relative disadvantage in obtaining health care, because they are more likely than whites to be uninsured and to rely on hospital-based providers for their primary care.

Though these conclusions may well be valid, they are in no way related to the behavioral differences to which the book's review of the evidence clearly points.

The book claims that the best evidence of lingering racial discrimination is in patterns of residential housing: "Discrimination against blacks seeking housing has been conclusively demonstrated." It has indeed been shown that blacks have more trouble finding desirable housing than whites of equal socioeconomic standing and educational level; blacks generally pay more for quality housing than whites. This offense against fairness is evidently largely explained, if not excused, by beliefs about the impact of black residents upon residential neighborhoods. The book summarizes evidence showing that whites believe that: (a) stable biracial neighborhoods are rare because, once blacks begin to move in, the neighborhood tends to tip toward becoming largely black; (b) residential values are depressed by the presence of blacks in a neighborhood; and (c) crime rates rise as the proportion of blacks increases. The authors may think that the truth or falsity of these beliefs is irrelevant, for they say nothing on that subject.

The book does suggest, however, that these views are not unique to whites. Thus it presents the results of a survey in which whites and blacks were asked to state their attitudes toward living in neighborhoods with varying proportions of white and black residents. The authors note that whites prefer neighborhoods in direct relation to the proportion of whites in them; they also note that blacks prefer not to live in exclusively white neighborhoods (per-

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haps, the authors suggest, because of a fear of white racism). They do not, however, comment on another conclusion of the survey: that blacks themselves increasingly dislike living in neighborhoods in which the proportion of blacks rises above 75 percent.

Blacks and whites evidently share some reservations about the effects of high black concentrations in residential neighborhoods—although whites object more at every concentration of blacks. We may infer, then, that at some point blacks as well as whites would prefer to prevent additional blacks from moving into their neighborhoods. The dislike of predominantly black neighborhoods—common to whites *and* blacks—frustrates blacks' quest for equal access to housing. This is so even if the dislike stems to some extent from realistic concerns shared by both races. Our society is committed to ending the segregation of housing caused by prejudice against blacks. Are we similarly committed to eliminating the segregation that reflects the apprehensions of both whites and blacks about security and real-estate values? Predictably, the book does not raise that question, let alone help us find an answer.

The dangers of dogma

This reluctance to pose obvious and important questions is the chief failure of *A Common Destiny*'s unwavering adherence to the discrimination model as the sole explanation of race differences. Life in a multiethnic society undoubtedly presents problems, and history provides many examples of attempted solutions that failed disastrously.[12] We cannot expect to find workable answers easily or painlessly. It is easy for us today to point to racism or discrimination as the obvious source of our difficulties—but it may not be the sole source. To the extent that racism is not the whole story, we can hardly hope to discover constructive public policies when we deny or ignore the possibility that distributional factors may account for some of the differences between the races.

Suppressing the distributional model is not only unwarranted, but also harmful. Dogmatic adherence to the discrimination model inhibits thinking about the problems of a multiethnic society, while creating new problems. If cognitive ability predicts performance without regard to race, then affirmative-action programs that set

[12] See, for example, Thomas Sowell's essay "Affirmative Action: A Worldwide Disaster" in the December 1989 issue of *Commentary*.

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different test-score criteria for blacks and whites in hiring or in admission to schools will result in different levels of performance. We can ignore this iron law of selection, but we cannot elude it; whether we realize it or not, we are often choosing between some level of disproportionate representation and some reciprocal level of differential performance. We eliminate the former at the cost of the latter. Depending on how different the hiring or admissions criteria are, and how well the criteria correlate with performance, the result will be performance gaps of varying sizes between the races.

Such gaps are undesirable. They may give many blacks the impression that their earnest efforts to do well are unappreciated, and they may give whites the impression that blacks are usually found near the lower end of the performance distribution. On one side are the corrosive effects of repeated frustration; on the other side, the almost reflexive and often unwarranted expectations of poor performance. On one side is the belief that the government does too little to produce equality; on the other, the belief that it intrudes too much into private matters. Both sides sense that an injustice is perpetrated, but they understand the injustice differently. As a result of this difference, we may be exacerbating our problems instead of solving them.

I realize that the disproportionate representation that the distributional model predicts creates its own problems. The evidence on residential housing illustrates this point well; even if it is not racism alone (at least as conventionally understood) that hinders blacks in the search for housing, the barrier is still intolerable to most fair-minded people. Elsewhere as well, the objective facts about performance may produce damaging subjective expectations. It may well be that the gains to society from attempting disproportionately to benefit blacks would outweigh the losses resulting from differential performance—if the performance gap is small enough.

But does anyone doubt that the costs may outweigh the benefits, if the performance gap is large enough? In short, treating the races differently has drawbacks as well as benefits. To say that these are hard and complex issues is to say the obvious. But it is the obvious that *A Common Destiny* ignores. Constrained as it is by the discrimination model, the book can find room for only one answer—always to press toward proportional representation, regardless of the magnitude of the costs and the paucity of the benefits.

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Employment testing and job performance

JAN H. BLITS & LINDA S. GOTTFREDSON

FOR MORE than twenty years, a fierce public-policy storm has raged over how or whether general mental ability tests should be used in employment selection. Employers typically favor using such tests because they are generally the best single predictor of job performance. But the tests are controversial because they disproportionately screen out blacks, who as a group tend to score considerably lower than whites.

Even though the 1964 Civil Rights Act specifically sanctions general ability tests, the federal government sharply curtailed their use, ostensibly to comply with Title VII of the Act. In 1970 the Equal Employment Opportunity Commission (EEOC) issued guidelines that the Supreme Court soon adopted as law in the landmark case of *Griggs* v. *Duke Power Company* (1971); after *Griggs*, any employment test that had an adverse impact on blacks was considered discriminatory and therefore illegal unless it could be shown to be specifically job related. In the wake of subsequent court decisions and stringent federal regulations for demonstrating

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job relatedness, employers virtually ceased using general mental ability tests.

In 1981, however, as a result of new research on testing, the Labor Department's Employment Service began encouraging state employment services to use its General Aptitude Test Battery (GATB) for all job referrals and to rank candidates according to test scores. Intended to improve the state agencies' screening of nearly 20 million applicants a year, the Department's action was based on psychological research that undercut the EEOC's original criticism of general ability tests. The original criticism rested on the fact that a given test's ability to predict job performance—its "validity"—seemed to vary from job to job, and from location to location. Because a test that was valid in one location often appeared to be invalid in other locations for the same job, experts tended to believe that every test needed to be validated separately for each new setting.

The new research, pioneered largely by Frank Schmidt and John Hunter, challenged the need for separate validation. By applying new techniques, Schmidt, Hunter, and other researchers showed that well-developed mental ability tests can be generalized to new locations and even to new jobs. Most of the previously observed variation in a given test's ability to predict performance from one job or setting to another was shown to be merely a statistical artifact caused by small sample sizes.

This new research has disconcerted many opponents of testing, because, while showing that general ability tests are valid for most skilled and semiskilled jobs, it does nothing to reduce their adverse impact. In fact, it shows that the persistent adverse impact of these tests cannot be blamed on the inadequacies of the tests themselves. Several decades of other psychological research have also refuted the still popularly held belief that general ability tests are racially biased—that is, that they underpredict the job performance of blacks. Many separate studies show that, contrary to prevailing public opinion, lower test scores among blacks and Hispanics are accompanied by lower job performance, just as in the case of whites.

The new research has thus revived and intensified the policy storm over general mental ability tests; the question now is not whether but how such tests should be used. Specifically, can they be used without incurring adverse impact?

The Labor Department found a way. Its 1981 action promoted

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not only the use of the GATB to improve productivity, but also the adoption of a race-conscious way of recomputing test scores to avoid adverse impact. The new procedure, called race-norming—or, euphemistically, "within-group scoring"—converts raw scores into group-based percentile ranks. Each candidate's score is reported not in relation to those of all other candidates, but only in relation to the scores of applicants of the same group. Blacks are compared only to other blacks, Hispanics only to other Hispanics, and "others" to all but blacks and Hispanics. Top scorers from all groups are then referred on the basis of their group-based percentiles to employers, who are often not aware that the candidates' scores have been so adjusted. In effect, race-norming gives bonus points to members of groups that tend to score lower than others, offsetting average differences in scores among groups. By 1986 state employment agencies in forty states had adopted the Labor Department's new referral procedure.

Race-norming crucially affects employment referrals. Among candidates for semiskilled jobs, for example, blacks at the 50th percentile on the GATB have raw scores of 276; Hispanics, 295; and whites, 305. A score of 305 is at the 84th percentile among blacks. Thus the raw score that would place a candidate at the 50th percentile among whites would place him at the 84th percentile among blacks. Likewise, among candidates for many skilled jobs, a black applicant with a score of 283 would have the same ranking and referral status (70th percentile) as a white applicant with a score of 327.

Faced with a 1986 challenge from the Justice Department (which held that race-norming constitutes unconstitutional reverse discrimination), the Labor Department agreed not to extend its program until the National Research Council of the National Academy of Sciences (NAS) conducted a thorough scientific evaluation of it. The NAS panel recently issued its report, *Fairness in Employment Testing: Validity Generalization, Minority Issues, and the General Aptitude Test Battery*;[†] this report has inadvertently provoked other, even more troublesome questions concerning not the impact of tests on racial groups, but the impact of politics on science. What is the proper role of political views in formulating important "scientific" evaluations? Is science being used as a guise for purely personal political preferences?

[†]John A. Hartigan and Alexandra K. Wigdor, eds. National Academy Press. 334 pp. $29.95 (paper); $39.95 (cloth).

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The NAS report

In its report, the NAS panel, headed by Yale statistician John Hartigan, confirms that the GATB's validity for predicting job performance is strong enough to enhance worker productivity; but it recommends that the tests not be used unless the results are race-normed. The panel was unable to justify race-norming on the grounds of racial bias—it confirms that tests like the GATB may even slightly overpredict the performance of blacks, particularly in higher level jobs; in this sense the tests are slightly biased in favor of blacks. Nor did it find that the tests were irrelevant—the panel found a 0.3 correlation between test scores and job performance, which means that employers can realize 30 percent of the gains in workforce productivity that a perfectly valid test would yield. Undeterred, the panel looked elsewhere and found—or at least claimed to find—justification for race-norming in the very nature of a selection system that favors people with high scores over those with low scores.

Any selection system that selects higher scorers over lower scorers necessarily favors those who are above a cut-off rather than those who are below it. However, some candidates who score below a cut-off may in fact be able to perform the job at least at a minimally acceptable level; such candidates are called "false negatives." Others, "false positives," score above the cutoff but are nonetheless unable to perform at a minimally acceptable level. The lower a test's validity, the more such false predictions are likely to occur. Now, more blacks than whites fall in the category of "false negatives," and more whites than blacks are "false positives." The reason for these disproportions has nothing to do with race *per se*, but arises from the fact that more whites have scores above the cut-off and more blacks below it. "[T]hese effects," the panel agrees, "are a function of high and low test scores, not racial or ethnic identity." Yet even as it emphasizes that the effect is the same for all low-scoring individuals, regardless of their race, the panel nevertheless claims that "the disproportionate impact of selection error provides scientific grounds for the adjustment of minority scores." It concludes, in other words, that the disproportions in false predictions provide a "scientific justification" for benefiting test takers whose scores—if anything—*over*predict their job performance.

The central failing of the NAS panel is that it recommends a race-based solution to what it concedes is not a race-based problem;

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thus it seeks a scientific justification for what is scientifically unjustifiable. The panel evidently set out to endorse race-norming; to do so, it had to make slanted analytic assumptions, to choose a questionable criterion for determining the tests' fairness, to disregard technical distinctions, and to frame policy considerations one-sidedly.

For example, the panel consistently interprets its data in ways that minimize the GATB's validity. Repeatedly choosing what it acknowledges to be the most "conservative analytic assumptions," it is able to limit the tests' estimated validity to 0.3. (Labor Department technical reports place it at 0.5 or higher.) Time and again the panel then belittles this correlation as "imperfect" or "only modest," despite admitting that it is strong enough to increase productivity. Since the tests' validity poses a stumbling block to any attempt to offer "scientific justifications" for race-norming, the panel is forced to disparage it. The better a test predicts job performance, the more "deceptive" (the panel's word) race-norming becomes.

Even as the panel chooses analytic assumptions that limit the tests' validity, it also sets a standard of perfect validity. The panel shows that the unadjusted GATB scores meet the only widely accepted criterion of fairness in testing—that a test predict equally well for all groups; it then drops that criterion, however, and adopts another—that the test's false predictions not adversely affect minorities—that the unadjusted scores fail to satisfy. In fact, though, any test that meets the commonly accepted criterion must necessarily fail to meet the panel's criterion. (Conversely, any test that meets the panel's criterion must necessarily fail to meet the commonly accepted one.) Only a perfectly valid test could meet both criteria; and perfectly valid tests do not exist. Most experts reject the panel's chosen criterion, viewing it as internally inconsistent; but the panel adopts it without reviewing the scientific literature critical of it or even acknowledging that serious criticism exists.

The panel also draws attention only to the crudest distinctions in job performance, ignoring differences between minimally competent and highly productive workers. For example, when asserting the unfairness of using unnormed test scores, the panel indiscriminately groups together as "able" all workers whose job performance is above a minimum level. This procedure has the effect of exaggerating the significance of false predictions, providing spe-

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cious strength to the panel's "scientific justification" for race-norming. Similarly, the panel recommends reporting a second, unnormed score for all candidates already referred on the basis of race-norming; the second score would indicate the probability that a candidate will perform "above average." Although ostensibly meant to reveal intergroup distinctions that race-norming (admittedly) conceals, the unnormed score in fact conceals the full extent of differences in expected job performance because it makes no distinctions among higher levels of performance. Its sole standard is "above average" performance.

Policy considerations

The panel's discussion of policy considerations is similarly one-sided. The panel warns, for example, that the renewed popularity of mental ability tests could lead some groups to feel superior and others to feel inferior; but it says nothing about the feelings that race-norming might produce among those same groups. In discussing race-conscious selection procedures, it cites the opinion of the Lawyers' Committee for Civil Rights Under Law, but not that of any of the group's mainstream or conservative counterparts. It repeatedly warns that the adverse impact of general ability tests makes employers vulnerable to Title VII discrimination suits, but it never points out that its own findings demonstrating the validity of the tests may constitute an employer's defense. It frequently emphasizes the possible advantages of race-normed referrals, but it never clearly assesses the economic costs or legal risks to employers. Although it emphasizes that the problem of false predictions is a function of low scores and not of race, it nonetheless recommends adjusting scores to benefit only minority "false negatives," not white ones.

Further, the panel misconstrues the obvious meaning of the phrase "adversely affect" in Title VII of the 1964 Civil Rights Act, so that it can claim that the title's definition of discrimination centers on unequal results for groups rather than on unequal opportunities for individuals. Contrary to the very words it cites, the panel concludes that "Title VII ... adopts a group-centered definition of discrimination, outlawing 'employment practices' that 'adversely affect' an individual's status as an employee because of that employee's race, color, religion, sex, or national origin." More generally, almost whenever the panel speaks of "equality of opportunity," it really means equality of results for groups.

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Likewise, when the panel discusses equal-protection jurisprudence and affirmative action, it relies on the constitutional interpretation of only one scholar, Laurence Tribe. And when it presents the arguments for and against preferential treatment, it inverts the natural order, placing the argument for after the argument against, and then concludes with a section devoted entirely to discrediting the case against preferential treatment.

In that section (entitled "Beyond Philosophy"), the panel, evidently speaking for itself, provides two arguments "to cut through the intellectualization of the issue of preferential consideration for blacks or other disadvantaged minorities." It first contends that preferential treatment has always existed in America, with only the intended beneficiaries having changed. "Very powerful forces support preferential treatment for veterans, including hiring preference in the civil service and referral priority by the U.S. Employment Service." But preferential consideration on the basis of race differs from grateful repayment for service to the nation; more generally, granting people rights merely because of their race differs from grouping together individuals with the same preexisting rights and claims.

The panel's second argument asserts "a skeptical assessment of the liberal values of equality, color-blind law, merit, and fair competition," as seen by those barred from enjoying them until the passage of the 1964 Civil Rights Act. In their view, the panel claims, domination over blacks was sanctioned first by religion (in the colonial period) and then by Social Darwinism (after the Civil War); now it is buttressed by "the myth of equality," which "provides a veneer for further oppression." If the panel is to be believed, just as preferential treatment is nothing novel in America, so too equality of opportunity is only a twentieth-century mask to hide racial oppression.

Politicizing science

Early in its report, the panel observes that "[i]n hindsight it is clear that many of the advocates of early [ability] testing allowed their scientific judgment to be influenced by contemporary racial and ethnic biases and by unexamined assumptions about the social order". The same is no doubt true of the panel itself, whose "scientific judgment" is clearly influenced by policy preferences. Race-norming seems to have been the panel's intended solution from the start.

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What the panel in fact shows is not that race-norming is scientifically justified, but that the decision to race-norm is not a scientific issue. The panel confirms that testing's adverse impact is not caused by defects in the tests themselves. Hence the adverse impact has no technical solution, let alone one that requires adjusting minority scores to compensate for "the inadequacies of the technology [of testing]." Nor is race-norming an issue on which scientists are in a special position to make policy recommendations. Instead, race-norming is a political question that ought to be answered politically. Whether the nation should adopt race-norming should be decided by public officials and ultimately by the citizens; to pretend that science can supply an answer is only to pervert science by politicizing it.

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Social psychology's "racism"

BYRON M. ROTH

MOST READERS of this and similar journals are familiar with the critique of the civil-rights agenda—especially the policies of forced busing and admissions or hiring quotas—that Thomas Sowell, Nathan Glazer, Charles Murray, and others have advanced. Such readers know that most Americans have opposed these policies all along; they think that this opposition testifies to the good sense of the American electorate.

But the reaction of most social scientists, in particular social psychologists, is quite different. Social psychologists generally support such policies, and they have difficulty understanding why others do not. In fact, their attempts to explain the opposition are almost invariably demeaning to the American people. The "problem" that they think requires an explanation is well stated by Donald Kinder:

> Denial of equal rights and opportunities to blacks no longer enjoys majority support. On voting rights, public accommodations, housing, and employment practices, racist sentiment has drastically diminished; in some cases it has virtually disappeared.... This is a striking change and

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> a momentous achievement. Nevertheless, political conflict over racial matters has not exactly disappeared. Indeed, affirmative action, racial quotas, "forced busing," and the "welfare mess" are among the most contentious public issues of our time. Forty years after Myrdal, in the wake of dramatic changes in public opinion and social custom, *why do so many white Americans continue to resist efforts designed to bring about racial equality?* [Emphasis added.]

Instead of taking the opposition to affirmative action at face value, understanding it as the product of honest disagreement over how best to achieve racial equality, many social scientists see it as an attempt to "resist" equality. In trying to explain that resistance, their theories caricature affirmative action's opponents as hopelessly naive, secretly prejudiced, or venal and uncaring. Studiously avoiding the many well-known and well-received critiques of affirmative-action policies, the theories reveal a singular insularity among social scientists.

The naiveté explanation

The least ingenious explanation of the public's disagreement with the civil-rights agenda is that the electorate is naive. According to this view, Americans do not understand how severely our society is stratified, and how many difficulties blacks and other minorities face in their efforts to achieve "equity." Americans who believe in the Protestant ethic are said to possess a childlike faith in individualism. In their book *Race and Equality*, Paul Sniderman of Stanford and Michael Hagen of Berkeley comment as follows on Americans' belief in this "folk ideology":

> Individualism, then, is an ethic: It is a bedrock belief in the ethic of self-reliance. Individuals must take care of themselves. They must not pretend to be victims of circumstance, or ask for specific favors, in an effort to get others to do for them what they should do for themselves....
>
> Individualism, so conceived, is an ungenerous idea. It is not ungenerous in the sense of being misanthropic. But it refuses to acknowledge that some are in fact handicapped and must overcome obstacles that are not of their making and that others do not face. In this sense the individualist lacks empathy for those disadvantaged by race or by poverty or by gender....

According to the authors, the naive popular culture spreads such views, "[f]or it deals directly with ideas about success and failure—about the importance of individual effort, for example, as expressed in the conviction that anyone with talent and a willingness to work can get ahead in America."

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If you agree with the following statements, the authors contend, you adhere to the ethic of "ungenerous individualism":

> It's a lack of skill and abilities that keep many black people from getting a job. It's not just because they are black. When a black person is trained to do something, he is able to get a job.
>
> Black people may not have the same opportunities as whites, but many blacks haven't prepared themselves enough to make use of the opportunities that come their way.

On the other hand, if you agree with the following, you exhibit a more sophisticated and generous understanding: "Even with the new programs, minorities still face the same old job discrimination once the program is over." In other words, if one rejects the view that coercive government action is necessary to counter discrimination, one ungenerously resists racial equality. There is not the slightest indication that Sniderman and Hagen have considered that the "wrong" responses to their statements may be more correct than their preferred alternatives. Conceivably, the public has learned something in the last twenty-five years that many social scientists have yet to understand: that if anything, the faith of poor blacks in the liberal agenda—their reliance on government support—has worsened their plight. Nor do Sniderman and Hagen seem aware that minorities may be harmed by accepting the thesis that American society is hopelessly discriminatory.

Other researchers also attribute hostility toward quotas to American naiveté. In a 1983 *Social Forces* article on attitudes toward affirmative action, James Kluegal and Eliot Smith argue that while whites—recognizing that blacks suffered from discrimination in the past—support programs to "assist blacks to acquire skills," they nevertheless oppose preferential hiring quotas "because they are thought to violate dominant equity norms." This opposition, the authors contend, is based on ignorance:

> The premise that affirmative action programs are necessary to equalize opportunity requires that whites believe that the stratification system currently does not provide equal opportunity for all persons and groups. In this regard the seeming insensitivity of whites to the socioeconomic disadvantage of blacks may stem more from racial segregation, and the resulting limited and naive perspective whites have on blacks' circumstances, than from prejudice and racism.

In fact, however, most Americans are not naive about how people get ahead in America; Kluegal and Smith are. As shown by Thomas Sowell, William Julius Wilson, and Ben Wattenberg, or

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simply by a fair reading of the census data, most of the evidence indicates that those who adopt the work ethic do quite well in America. Kluegal and Smith certainly offer no evidence to the contrary.

Symbolic racism

By far the most influential explanation for opposition to busing and quotas is offered by John M. McConahay, David O. Sears, and Donald Kinder. They and various coworkers have generated a sizable collection of works that blame this opposition on what they call "symbolic racism." All objective measures of white Americans' attitudes reveal a steady decline in racism. But since opposition to busing and quotas remains high, these researchers hypothesize that some more elusive form of racism may explain it. Kinder and Sears argue that Americans rationalize this new racism in terms of a commitment to traditional values:

> In years gone by, it was easy to specify the content of this early-learned prejudice: it centered on intentional and legitimate discrimination and segregation. However, over the past thirty years, white opposition to equal opportunity has sharply declined. On voting rights, schools, public accommodations, housing, and employment practices, segregationist sentiment has all but disappeared. White America has become, in principle at least, racially egalitarian—a momentous and undeniably significant change. Since the explicitly segregationist, white supremacist view has all but disappeared, it can no longer be a major political force.
>
> What has replaced it, we suggest, is a new variant that might be called symbolic racism. This we define as a blend of antiblack affect and the kind of traditional American moral values embedded in the Protestant ethic[,] .... a form of resistance to change in the racial status quo based on moral feelings that blacks violate self-reliance, the work ethic, obedience, and discipline. Whites may feel that individuals should be rewarded on their merits, which in turn should be based on hard work and diligent service. Hence symbolic racism should find its most vociferous expression on political issues that involve "unfair" government assistance to blacks...; welfare...; "reverse discrimination" and racial quotas...; "forced" busing...; or "free" abortions for the poor....

Thus agreement with traditional American values provides a cover for the expression of deeply felt prejudice, and hence is evidence of racial hostility.

But how do Kinder and Sears know whether people who hold such views are racists and not simply upholders of traditional values? To distinguish opposition based on racial animosity from opposition based on political belief would require independently

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validated measures of each, which Kinder and Sears do not provide. Instead they measure "symbolic racism" by means of a questionnaire that hopelessly confuses the two types of opposition. They based their 1981 paper on the attitudes of voters in Los Angeles mayoral elections, for instance, on responses to the following questions:

1. Do you think that most Negroes/blacks who receive money from welfare programs could get along without it if they tried, or do they really need the help?
2. [Agree or disagree:] Because of past discrimination it is sometimes necessary to set up quotas for admission to college of minority group students.
3. Do you think Los Angeles city officials pay more, less, or the same attention to a request or complaint from a black person?
4. Of the groups on the card, are there any which you think have gained more than they are entitled to?
5. [Agree or disagree:] It is wrong to set up quotas to admit black students to college who don't meet the usual requirements.
6. [Agree or disagree:] Over the past two years blacks have got more than they deserve.
7. In Los Angeles, would you say many, some, or only a few blacks miss out on jobs or promotions because of racial discrimination?
8. [Agree or disagree:] Negroes/blacks shouldn't push where they're not wanted.
9. [Agree or disagree:] Busing elementary school children to schools in other parts of the city only harms their education.
10. [Agree or disagree:] In some cases it is best for children to attend elementary schools outside their neighborhood.
11. Are you in favor or opposed to the busing of children to achieve racial desegregation?
12. If the Supreme Court ordered busing to achieve racial desegregation of public schools would you be opposed to it?
13. [Agree or disagree:] If necessary, children should be bused to achieve racial desegregation.

One's symbolic-racism "score" is determined by how many questions one answers in the "wrong" way. Those who oppose busing and quotas are therefore guaranteed to score high on symbolic racism, even if they get credit for all the other items. If they also disapprove of welfare policies and the political activism of black militants, they would be considered hopeless symbolic racists. Item 8, "Blacks shouldn't push where they're not wanted," does seem to suggest segregationist attitudes. But even this is not clear, for while 64 percent of respondents agreed with that statement, 70 percent of the people who responded to a questionnaire distributed at the same

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time and reported in the same article said that they would not mind if a black moved next door to them.

The authors advance no evidence to show that this new "symbolic" racism (which seems simply to mirror the attitudes held by many reputable public figures at the time) was related to real racism. In fact, Sears's coworker John B. McConahay stressed in an earlier paper that there was no relation. McConahay found that symbolic racism was most highly correlated with such things as identifying with the Republican party and believing that children should be taught patriotism in schools. This finding is hardly surprising, since the symbolic-racism scale really measures political conservatism. The only independent validation of Kinder and Sears's symbolic-racism scale was the voting behavior of the respondents. Those who scored high on symbolic racism (i.e., expressed prevailing conservative views) were found to be more likely to vote for a white Republican (Yorty) in the mayoral election than a black Democrat (Bradley). This perfectly rational voting pattern was characterized by Kinder and Sears as "antiblack voting behavior."

Yet despite these weaknesses, Kinder and Sears's research won "the 1978 Gordon Allport Intergroup Relations Prize from the Society for the Psychological Study of Social Issues." Carried out "under the direction of Thomas Pettigrew" (a highly respected social psychologist), the research is widely reported in most introductory texts in social psychology as solid scientific evidence of the racism of American society.

It is true that the Sears, Kinder, and McConahay position has met some criticism. Paul Sniderman (creator of the "naiveté" explanation) and Philip E. Tetlock have attacked as "scandalous" the confusion of racism and political conservatism. But Sniderman and Tetlock have also insisted that it is an error to claim that old-fashioned racism has "all but disappeared." Kinder's reply is revealing. He agrees that he and Sears overstated the case, but then points to much research that shows a very weak connection between traditional racial prejudice and attitudes on such matters as busing:

> McConahay (1982) found a small effect of traditional racial prejudice on opposition to busing in Louisville; Bobo (1983) found no effect in 1972 and a tiny effect in 1976 using national samples; Sears and Kinder (1971) and Kinder and Sears (1981) put the question aside since racial prejudice, measured in traditional ways, had virtually vanished from the

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> Los Angeles suburbs; only McClendon (1985) found a sizable effect due to old fashioned racism. By these results, the political impact of traditional forms of racial prejudice pale against those due to symbolic racism.

"Symbolic racism," then, is a phantom conjured up to substitute for a racism that has declined in significance.

Missing in the exchange between Kinder and his critics, and in this literature in general, is any hint of the possibility that people oppose preferential hiring out of a *well-reasoned* attachment to traditional American values. There is not the slightest indication that America's prosperity and the wealth of opportunities that have traditionally been open to new immigrants are in part accounted for by those very values. The assumption that America is an ungenerous and racist society is simply too deeply ingrained in the liberal orthodoxy to be challenged by evidence to the contrary, even the evidence that the researchers gather themselves. No one questions, furthermore, how a prejudice that is so hard to detect can also do enough harm to require the coercive abandonment of widely shared and important values.

"Realistic" group-conflict theory

Many researchers have attempted to determine whether white opposition to affirmative-action policies is the result of symbolic racism or of the "real" racial threat that those policies purportedly pose to whites. Lawrence Bobo, the leading spokesman for the view that real racial threat is involved, puts it this way:

> The central thesis underlying the present discussion is that racial attitudes reflect the existing economic, social and political relationships between black and white Americans; in other words, the real features of group relations and conflict. Specifically, American social organization allows and fosters in whites the belief that blacks, in so far as they demand changes in the racial status quo, are a threat to their lifestyles, as well as to other valued resources and practices.... Further progress in the struggle for racial equality and integration such as affirmative action goals or quotas will likely .... upset some aspect of the social experience of most whites (e.g. eliminate segregated schools and housing). Therefore whites come to view a policy like busing as threatening to states of affairs with which they are quite comfortable—threatening to a social world and position in society they accept and value.

Bobo thinks that whites have a group interest in maintaining the racial status quo; he believes that improvements for blacks are "challenges to [whites'] group status or position." For Bobo "the

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contemporary features of inequality and group conflict are ... focused on the pace of change and matters of resource distribution (like access to quality schools)."

But what is the empirical basis for this group-conflict view? Sears and his coworkers had argued that actual self-interest was *not* important in determining opposition to such policies as busing. They found, for instance, that people who had children in school did not have different attitudes toward busing than those without children, or with children beyond school age. Bobo reanalyzed their data and reached similar conclusions. He thinks, however, that this finding is not critical, since "[p]eople can form an opinion about an ongoing and controversial issue like busing simply by thinking in terms of the interests of 'myself and people like me.'" Bobo identified the factors most highly associated with anti-busing sentiment and concluded:

> Perhaps the most significant result of the present research is the discovery that perceived threat and applied policy predispositions are the strongest predictor of whites' opposition to busing.... Indeed, an apparent anomaly in the results points out the value of particular perceived threat variables. Questions about the *character* or methods of the civil rights movement ("Actions Hurtful" and "Actions Violent") *did not* influence opposition to busing, but questions concerned with the *pace* and *implications* of change did ("Civil Rights Push" and "Dislike Black Militants"). Taken together, these results go far in explaining the discrepancy between whites' tendency to endorse principles of integration and equality ... and the simultaneous tendency to reject specific integrationist policies like busing.

Yet why should opposition to busing be correlated with attitudes toward the pace of civil-rights change, but not with attitudes toward civil-rights methods? "Civil Rights Push" was measured by responses to this question: "Some say the civil rights people have been trying to push too fast. Others feel they haven't pushed fast enough. How about you?...." "Actions Hurtful," on the other hand, was measured by responses to the following: "Do you think the actions black people have taken have, on the whole, helped their cause, or, on the whole, hurt their cause?" But given all the political heat that busing has generated, most people who oppose busing probably think that it decreases sympathy for blacks and thus hurts their cause. Bobo never quite resolves this "apparent anomaly." His confusing and seemingly contradictory findings simply do not justify his conclusion that whites think that blacks threaten their social status.

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This is not to deny that some whites oppose affirmative action out of a real conflict of interest. After all, if a black applicant is given preferential admission to a prestigious university, a nonblack applicant must be denied a place. The same is true of minority set-asides and other affirmative-action programs. But Bobo's research does not directly address such issues. The survey does not ask respondents whether they believe that busing will harm their children's education, or whether their children will be endangered by being bused to an integrated school—even though such questions might clarify things. Nor does Bobo acknowledge that people may oppose busing and quotas because they believe them to endanger society by fostering group resentment and promoting intergroup hostility. Raising these questions, of course, would highlight the rational bases for opposition to affirmative action and busing. Like those whom he criticizes, Bobo ignores the possibility that people might honestly consider quotas and busing unwise and counterproductive.

Where is the underclass?

One of the literature's most glaring weaknesses is its failure to consider class as an important determinant of perceptions about race. The "American public" whose responses to various questionnaires are analyzed is generally a middle-class population, whose attachment to the Protestant ethic is well-known. Middle-class Americans tend to place great value on home ownership, neighborhood respectability, and education. The questionnaires ask such people to take positions on "blacks." But to what blacks do the questions refer? All of them are surprisingly vague on this point, especially in light of the widely acknowledged chasm that has developed between middle-class blacks and "underclass" blacks. The incomes, educations, and lifestyles of the former are increasingly indistinguishable from those of their white counterparts. Underclass blacks, however, are marked by social pathologies—illegitimacy, crime, school failure, drug abuse, unemployment, and so on—that are alien to most members of the middle class, whether black or white. This dichotomy within the black population is ignored in the debates about the meaning of white attitudes toward busing and quotas.

Among the obvious reasons for whites' rejection of quotas, and for their refusal to see discrimination as the bugbear described by civil-rights advocates, is the fact that blacks—even very poor

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blacks—who hew to "middle-class" mores by postponing parenthood, finishing school, and avoiding drugs and crime are doing quite well; by contrast, those in the underclass, whose behavior violates those mores, fare badly. Given this undeniable reality, how is one supposed to choose between the following statements from Sniderman and Hagen's questionnaire?

> A. Many blacks have only themselves to blame for not doing better in life. If they tried harder, they'd do better.
>
> B. When two qualified people, one black and one white, are considered for the same job, the black won't get the job no matter how hard he tries.

To choose "A" is to be labeled "ungenerous" toward the plight of blacks, even though the statement is obviously correct. By contrast, the second statement is patently absurd. The contradictory responses that people give to such questionnaires does not point to their ambivalence about racial equality. Instead it suggests that the questionnaires were designed and interpreted by social scientists who are insulated from reality.

The researchers' obliviousness to the black underclass also calls into question their easy assertions about the extent of "old-fashioned redneck" racism. For instance, all researchers agree that support for segregation is a mark of real racism. It is typically measured by responses to questions like the following ones, asked by Gallup pollsters during 1978 and 1980:

> 1. Would you, yourself, have any objection to sending your children to school where a few of the children were black? [95 percent of the respondents said "no."]
>
> 2. Would you, yourself, have any objection to sending your children to school where half the children were black? [76 percent said "no."]
>
> 3. Would you, yourself, have any objection to sending your children to school where more than half the children were black? [42 percent said "no."]
>
> 4. If a black person came to live next door would you move? [86 percent said "no," 10 percent said that they might, and 4 percent said "yes."]
>
> 5. Would you move if black people came to live in great numbers in your neighborhood? [46 percent said "no," 33 percent said that they might, and 21 percent said "yes."]

Do the objections of a majority of white parents to their children's attending a largely black school indicate lingering racial hostility? Might they instead point to the *fact* (not merely the perception) that many such schools are dangerous places with inade-

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quate educational standards? Do the 33 percent who said that they might move (and the 21 percent who said they would move) if large numbers of blacks moved into their neighborhoods reject integration "in practice"? Or do these figures reflect a concern that the "large numbers of blacks" might include many members of the underclass? Few members of the middle class—whether white or black—see underclass blacks as desirable neighbors.

In truth, the hard data that supposedly buttress the analyses of whites' racial attitudes are susceptible to a wide variety of interpretations. By no means do the data justify social scientists in their competing and demeaning explanations of Americans' "resistance to racial equality."

Most Americans know—and are prepared to admit—that the lot of blacks in this country is often hard. These same Americans oppose paternalistic government policies that run counter to traditional American values; they consider such policies unsound, unwise, and unlikely to help blacks in the long run. All surveys indicate that Americans support efforts to assure blacks a fair shake. They also reveal a broad consensus that, given a fair shake, blacks can and should make it on their own. If the American people hold such beliefs, as this research suggests, perhaps they are correct and the social scientists who denounce them are wrong.

In 1975 Nathan Glazer, in his *Affirmative Discrimination*, said that America's use of racial quotas signals that

> we have abandoned the first principle of a liberal society, that the individual and the individual's interests and good and welfare are the test of a good society, for we now attach benefits and penalties to individuals simply on the basis of their race, color and national origin. The implications of this new course are an increasing consciousness of the significance of group membership, an increasing divisiveness on the basis of race, color and national origin, and a spreading resentment among disfavored groups against favored groups.

Glazer was right to deplore this shift. Most Americans agreed with him all along. It appears at long last that the Supreme Court may have begun to see the wisdom of the public's good sense on these issues. Perhaps even the social scientists will ultimately get the message.

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Tissue transplants: the dilemma of the body's growing value

EMANUEL D. THORNE

JEREMY Bentham, in an 1831 essay entitled "Of What Use is a Dead Man to the Living?," argued that autopsies should be allowed because of the usefulness of human bodies to research. Indeed, Bentham invited his friends to observe the dissection of his own body upon his death. He thought, moreover, that men of exceptional quality could inspire future generations of thinkers by their physical presence; in that spirit, each year since Bentham's death in 1832, the trustees of London's University College have brought out his preserved body during their annual deliberations.

Recent advances in biotechnology have made human beings—living and dead—useful to each other in ways that Bentham probably never imagined. Transplants of human hearts, livers,

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kidneys, corneas, skin, and bones are now commonplace, and new uses for human body parts are proposed almost daily. Each year about 13,000 Americans receive organ transplants. Several million more Americans could benefit if therapies based on transplants of fetal tissue prove successful in treating such diseases as Parkinson's, diabetes, and Alzheimer's. Perhaps even more significant than developments in transplantation is the increasing use by biotechnology companies of human tissue to develop commercial products. In short, we are witnessing the emergence of a large-scale production system that uses human tissue as a basic resource.

These wondrous yet potentially nightmarish new uses of human tissue signal a profound change in what humans can do for one another. Although they may be able to relieve a great deal of suffering, therapies based on human tissue are unlikely to gain widespread acceptance without a reassessment of closely held values. Such was the case with heart transplantation, which required us to redefine death in terms of brain inactivity rather than heart stoppage—a step that some advanced industrialized societies have still not taken. A similar reassessment may be needed if other tissues, such as those from aborted fetuses, are to be used; the resistance that would have to be overcome is illustrated by the moratorium on federal funding of fetal-tissue research imposed by the Reagan and Bush administrations.

Undoubtedly, some proposed uses of tissue will be deemed beneficial and some will be deemed harmful. The moral ambiguity of still other uses will demand more study and discussion. To meet the challenge of promoting beneficial uses and deterring harmful ones will require effective regulatory strategies that not only reflect ethical values but also respect economic and social realities.

To date, America's principal regulatory approach to the use of blood and organs has been to ban markets in these tissues. Other countries, however, have not adopted this policy. India, for example, permits living donors to sell their organs, and at a recent conference transplant surgeons from Saudi Arabia, Kuwait, and India described the nexus of trade in kidneys from unrelated living donors that is developing among these countries.

We must decide whether our current policy of noncommercialism is appropriate in view of the expanding uses for human tissue, the emerging production system that links many countries, and the need to coordinate nonprofit and for-profit entities. If noncommercialism is inadequate, what are our alternatives?

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Altruism versus commercialism

Ever since economist Richard Titmuss published his influential 1971 book *The Gift Relationship: From Blood to Social Policy*, a fierce debate has raged over whether there should be markets in blood. In his book, Titmuss observed that

> [t]here is a bond that links all men and women in the world so closely and intimately that every difference of colour, religious belief and cultural heritage is insignificant beside it. Never varying in temperature by more than five or six degrees, composed of 55 percent water, the life stream of blood that runs in the veins of every member of the human race proves that the family of man is a reality.

Because of this kinship among human beings, Titmuss argued, blood should be offered as a gift. He was concerned that "commercialization of blood and donor relationships represses the expression of altruism, erodes the sense of community"; he also feared that it would redistribute blood from the poor to the rich and generally lower ethical standards.

For people unimpressed by his ethical basis for opposing commercialization, Titmuss offered other arguments that many thought were his most effective. Especially compelling was his evidence suggesting that a commercial system subjected both recipients and donors to unnecessary risks. Titmuss found that hepatitis rates from blood transfusions were much lower when blood was donated rather than purchased. In the absence of good tests for diseases like hepatitis, donated blood is thought to be of better quality, since donors who are not paid for their blood have no incentive to hide their illnesses. The appeal to altruism may also tend to attract people with healthier habits. Titmuss further argued that offering financial incentives to blood donors could cause those in need of money to take unnecessary risks; they might donate too frequently, thereby endangering their own health. Finally, Titmuss tried to show that a commercialized blood-supply system is costly to administer, highly wasteful of blood, and characterized by shortages.

Titmuss's radical contention was that cooperation based on altruism could be not only more ethical, but also more efficient. He believed that his findings, which were consistent with his socialism, had profound implications for social policy in general. Consequently, his investigation of blood-supply systems attracted intense scrutiny.

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In a 1974 review of Titmuss's book in *Philosophy and Public Affairs*, Kenneth Arrow found Titmuss's evidence to be "a powerful indictment of the efficiency of blood-giving in the United States." Arrow noted that the basic problem in procuring blood had parallels in other commodities and services in which the buyer is not in a position to know what he is buying, whereas the seller knows what he is selling. Used cars are a good example. In such cases, Arrow wrote, "Some alternative system for determining quality and providing assurance to buyers is needed." Where the price system breaks down, "ethical behavior can be regarded as a socially desirable institution which facilitates the achievement of economic efficiency."

Proponents of markets counter Titmuss with ethical and nonethical arguments of their own. They contend that the poor should not be denied the right to sell their tissue, since the tissue may be their only asset. They point out the irony of a system that prohibits the poor from selling their organs, but that cannot assure them an affordable transplant.

They also contend that altruism is not the only way to achieve high quality. In a 1974 American Enterprise Institute study, Reuben Kessel argued that contaminants in the blood supply and the shortage of blood were real problems, but that they stemmed from too little commercialism, not too much. The quality of the supply could be improved, for example, if strict liability rules were applied to procurers of blood, who would then have strong financial incentives to develop techniques to screen their suppliers carefully. Reviewing the history of legislation in this area, Kessel argued that the impetus for eliminating commercialism in blood acquisition came from the medical establishment's desire to avoid such strict tort liability. Others have asserted that the concern over safety was not a significant factor in the concerted efforts of the nonprofit blood procurers to eliminate paid blood donations, in that the hepatitis problem chiefly provided a pretext for eliminating competition.

Titmuss's arguments carried the day eighteen years ago, and today a policy of noncommercialism extends to regulation of all human tissue. All fifty states have adopted the Uniform Anatomical Gift Act, and Congress enacted the 1984 National Organ Transplant Act limiting property rights to human tissue. According to Yale professor Susan Rose-Ackerman, people now have a "modified" property right to their organs; they cannot sell their

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organs, but they retain the right to donate them, and nobody has the right to take them away.

Today Titmuss's ethical arguments are more influential than his economic ones; the lines in the debate on commercialism now seem more clearly drawn. Those who favor markets in body parts do so primarily to increase efficiency; they contend that payments to donors would elicit a greater supply, thereby reducing shortages. Those who oppose markets do so primarily on the ethical grounds that markets will lead inevitably to the "commodification" of human beings and to severe abuses of human rights.

New developments

Two emerging technical developments will challenge both proponents and opponents of markets in tissues. The developments point to our growing ability to influence the two fundamental decisions that must be made in the allocation of scarce human tissue: how much tissue is to be "produced" and who should get it.

The first development, which will test the proponents of markets, is the discovery that fetal tissue may be useful in therapeutic transplantation. With 1.6 million induced abortions in the U.S. annually (and 32 million abortions worldwide), the supply of fetal tissue appears ample. This supply, however, is not at all assured, given expected challenges to *Roe* v. *Wade*, advances in contraceptive methods, and the appearance of abortifacient drugs. Still, even the most market-oriented economists, who are generally not distressed by the commodification of the human body, are unlikely to favor paying mothers to abort their fetuses—although they are fully convinced that shortages of tissue result from interference in markets.[1] They cannot rely on market incentives, or even on appeals to altruism, to increase the supply of fetal tissue.

The second development, which will challenge the opponents of markets, is the growing use of human tissue in the production of pharmaceuticals.[2] In commercial production, one person's cells

[1]The potential for baby breeding has not, however, deterred Judge Richard Posner from advocating baby selling as a solution to the shortage of babies for adoption. Even such staunch market advocates might balk, though, if fetal tissues rather than babies were being bred.

[2]Commercial use of tissues has already generated a legal dispute; a former leukemia patient in California is now suing his physician for royalties to a patent on a cell line—developed from his cancerous blood and spleen—that has been licensed to a biotechnology company.

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will be combined with those of others, or perhaps with bacteria or other materials. Together, these factors of production, some donated and some purchased, will generate a final product—such as a pharmaceutical that several million people might use. While such applications might be extraordinarily beneficial, the scale and complexity of the production process would severely attenuate (if not break) the spiritual bond between donor and recipient that underlies Titmuss's "gift relationship." Banning the sale of tissue would not restore this relationship.

These two developments will complicate decisions about how to use human tissue. At present, allocations of tissue may not be made by markets; considerations of equity—and not the ability to pay—are supposed to predominate. But how are we to decide whether to give tissue to a biotechnology company that wants to produce a pharmaceutical? How are we to choose between competing uses, proposed by different biotechnology companies, for the same tissue? How are we to assess requests from biotechnology companies that want tissue in order to make an inessential product—such as the already existing shampoo and facial cream named Placenta? Should an economic valuation of the tissue play a role in these decisions?

When an ordinary good is provided through a pure market, the two allocation decisions—how much should be produced and to whom it should go—are made simultaneously. Such is the nature of markets. In cases of life and death, however, markets are often not allowed to operate, for ordinary market allocations demonstrate too clearly that life is not priceless, and that some lives are more valuable than others. When deeply held values necessarily conflict in this way, Guido Calabresi and Philip Bobbitt observe in *Tragic Choices*, the two allocation decisions are made separately. In deciding who should have access to dialysis machines or who should provide military service, for example, the state is often forced to negotiate principles. (Calabresi and Bobbitt note that the state often prefers the market, which enables it to wash its hands of the tragic choice altogether.)

As long as hijacking live humans for their body parts is illegal and not in common practice, we have been able to consider the supply of human tissue as fixed. The only means to increase supply is to "harvest" the available tissue more efficiently by efforts such as public education. Because nothing (beyond a certain level) can be done to increase the supply of, say, transplantable hearts, the

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only allocation decision is who should get the available hearts. This situation is very different from the one posed by renal-dialysis machines, in which we must not only decide who gets the existing machines, but also determine how many machines will be produced and made available for allocation.

But recent developments threaten to present us with a new tragic choice. The aborted fetus at present lacks the legal status of born humans; hence, in the absence of ethical inhibitions, some may suggest that efforts could be made to expand the supply of fetal tissue to meet demand. The capacity of fetal tissue to be "produced" in almost any quantity to meet demand means that allocation decisions for fetal tissue more closely resemble those for renal-dialysis machines than those for other organs. In the absence of markets to make the allocation decisions, we will have to make the tragic choice; in banning transplants with fetal tissue we simultaneously deny treatment to sufferers of Parkinson's disease and diabetes.

Human tissue as common property

Much of what we observe about the structure and organization of the human-tissue industry can be traced to two features of current regulation: the insistence on altruistic donation and the failure to specify the "owner" of the donated tissue, to whom its economic value would accrue.

The failure to specify clear property rights to tissue means that in principle there is nothing to prevent middlemen from reaping the value of donated tissue. Nonprofit organ-procurement agencies, for-profit transplant surgeons, and others therefore compete very intensely—and inefficiently—to acquire a property right to the tissue.

To understand this, it is helpful to consider other activities that involve common resources. Analyses of commercial fishing, to take one example, conclude that the economic value of the free resource—the fish—rarely reaches the consumer. Instead it is dissipated: if the fishermen can collude, they limit their fishing and charge higher monopoly prices; if they cannot collude, they engage in inefficient activities such as overfishing. In either case, the retail price of a can of tuna fish may not reflect the fact that the fish itself was free.

Or consider college basketball. CBS recently announced that it would pay the National Collegiate Athletic Association $1 billion

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for the rights to televise its national championship tournament. But colleges make up a cartel, agreeing that their players can legally receive nothing more than scholarships and subsistence. This arrangement ensures that the schools get the bulk of the money that the games generate. In this respect, players' talents are like individuals' tissues: amateur athletes cannot sell their talents, but they retain the right to donate them, and no one can force the athletes to play.

When Congress banned organ sales, it made organs a free resource to users. Yet organs are *not* free from society's point of view. The following scenario illustrates the wastefulness of treating human tissue as if it were a free resource in the commons. Suppose that a transplant surgeon is willing to pay up to $50,000 for a particular type of human tissue, because a patient is willing to pay him that sum on top of the fee for the surgery. If perfect markets exist, the $50,000 will go to the donor of the tissue. If they do not, the surgeon must convince someone to donate the tissue. He would prefer to do this at no cost, but if he cannot, he will still be willing to spend up to $50,000 to procure the tissue somehow. He might, for example, pay for television solicitations to attract donors, charter a private plane to visit them, or hire lawyers to represent him in conflicts with other surgeons seeking the tissue. Although these expenditures would all be legal (and would be rational for the surgeon, who can collect his surgical fee only if he has tissue to transplant), they are wasteful from society's point of view. Why is a noncommercial system preferable if the money generated by tissue production goes not to the donor but to a surgeon, a television studio, an aviator, or a lawyer?

The difficult role for nonprofit organizations

The other important feature of the current legislation—the requirement that donation be altruistic—has led us to rely on nonprofit organizations (such as the American Red Cross) to procure and distribute blood and other tissues. Nonprofits can successfully solicit donations because donors—who do not know and are not in contact with the transplant recipients—need trustworthy agents. A similar market failure explains why people who wish to provide food to the poor overseas donate money to CARE instead of using efficient organizations with experience in the food business, such as Safeway. According to Yale law professor Henry Hansmann, "Consumers may be unable to

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evaluate with any accuracy whether the promised good or service has been delivered. In such circumstances the market may well provide insufficient discipline for a profit-seeking producer." Because the donor would have great difficulty in verifying that Safeway had fulfilled its part of the agreement, he "needs an organization that he can trust, and the non-profit, because of the legal constraints under which it must operate, is likely to serve in that role better than its for-profit counterpart."

Still, though nonprofits play an important role in supplying human tissue, many of the current system's limitations result from the need to rely on them. Because the economic value of the tissue is available to whoever carves out a property right, nonprofit organizations find it very hard to coordinate their activities. This failure has been documented in an excellent report by Joel Swerdlow of the Annenberg Washington Program, which recently called for Congress to establish a national policy to facilitate transplants. As the report notes, it is easier to secure a part for a broken car than a kidney for a dying patient. Similarly, although a consumer can schedule an airline flight or book a hotel room anywhere in the world, matching a bone-marrow donor with a suitable recipient is beyond current capabilities. The problem is that the human-tissue world lacks even rudimentary communications systems. As the report explains, the enormous shortages of organs such as kidneys (17,000 people are on the waiting list for transplants) and hearts stem from this inadequacy; Swerdlow calls upon Congress to facilitate the establishment of a national coordination and communications system.

Why has a system of coordination and communication not arisen naturally? After all, private parties established the airline-reservation system when its usefulness became apparent. The crucial difference is that the property rights to tissue are unclear. Under the current system, organ-procurement agencies and transplant surgeons have little incentive—beyond a sense of social obligation—to send an organ that they have procured to another agency, located where a need for the organ exists. There is at least one anecdotal report of an organ-procurement agency that cut up a heart for its valves because the agency had no suitable recipient in its region—even though it knew of a suitable recipient in another region. The natural tendency for the participants to compete is exacerbated by the property rights that are now vested in organ procurers.

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Nonprofit organizations have few structural incentives to coordinate their activities; in addition, their attempts to grow in order to achieve economies of scale often fail. If these organizations were private profit-making entities, the process of competition and the possibility of takeovers might result in a rational system that could achieve economies of scale. But since the organizations are nonprofit, mergers and acquisitions cannot take place through market mechanisms. Instead, there must be a drawn-out process of politics and persuasion, which may never yield the optimal scale.

The need for economic analysis

Although our policy of noncommercialism in human tissue cannot be said to have failed (it arranges life-saving transplants of organs for many Americans each year, with no reports of human-rights abuse), it will become increasingly inadequate as even more uses are found for human tissue. To say this is not to reject the ethical case against markets; while Titmuss may have overreached with his claim that altruistic cooperation is not only more ethical but also more efficient, ethical concerns may nevertheless lead us to continue to ban markets in tissue. In that case noncommercialism could be made more efficient if we were to bring the insights of economic analysis to bear on the use of human tissue.

Such analysis is appropriate, for—whether we like it or not—the human body now has economic value. Economic analysis, by focusing on the scale and complexity of the emerging production system, can serve as a handmaiden to ethical analysis and thereby assist policymakers in regulating the system in accordance with moral imperatives. At the same time, however, there are obvious differences between body tissues and commodities. Should economic analysis ignore these vital differences, the prescriptions of economists will quite rightly be ignored by policymakers.

An effective policy on human tissue would provide organs of high quality in sufficient quantity to all who need them; it would keep the economic value of the tissue from middlemen, encourage cooperation between parties, and offer a way to decide between competing uses of tissue. If a policy of noncommercialism is to approach these objectives, some notion of commodification must be introduced, perhaps indirectly; we must know the economic value of the tissue and assign it to some party.

One way to perform this feat with other factors in the commons—such as fish in the ocean or broadcast frequencies in the

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air—is to auction licenses that grant exclusive rights to these resources. But this step is feasible only where profit-making enterprises are appropriate. It is not feasible to auction off licenses that would permit for-profit firms to solicit donated tissue, since people are unlikely to donate to private firms.

How, then, might indirect commodification work in the case of human tissue? Some have suggested that, in lieu of paying for organs, the donated organs be treated as "rewarded gifts" with donors being compensated for the inconvenience, hospitalization, and loss of income necessitated by the donations. Others have devised schemes whereby donors might receive tax breaks, or payments from insurance companies for the right to their organs upon their death. These schemes suffer, however, from their inability to ensure that the payments made to donors are the "correct" amounts to elicit the optimal supply. Nor are the payments sufficiently indirect to appear as anything but payments.

A better alternative would be to assign by law the economic value of the tissue to designated regional nonprofit organizations that would procure and distribute it. The nonprofits would charge the full value of the tissue to intermediaries such as transplant surgeons, hospitals, or pharmaceutical companies. In effect, a market in tissue would exist at a later stage in the production process. Each nonprofit would charge a market price that would reflect what the donor would have received had there been markets, together with the nonprofit's cost of administration.[3] This system would keep middlemen from appropriating the value of the donated tissue, while encouraging economically rational uses of tissue. It would also promote productive but not inefficient competition for the property rights to the free tissue. Finally, it would enable the nonprofit to obtain funds to further worthy programs such as public education to increase donation.

Government intervention is required to foster a national policy, not because human tissue is inherently a public good, but because of the inefficiency resulting from government regulations that require altruistic donation without assigning clear property rights to tissue. Banning markets in human tissue, as we have done, does not stop the play of economic forces; nor does it free us from thinking about human tissue in economic terms. A far subtler

[3]An indication of this cost is provided by data recently compiled by the Office of Technology Assessment: in 1980 hospitals paid $32 on average for a unit of red blood cells, whereas they charged patients about $89 for such a unit.

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policy than noncommercialism alone is needed to regulate the new uses of human tissue effectively. Indeed, if we succeed in designing a policy that not only reflects ethical values but also respects economic and social realities, we may realize Titmuss's hope of promoting efficiency while enhancing humanity.

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Rediscovering the three-decker house

HOWARD HUSOCK

THE DEBATE about how best to increase the supply of low-cost housing has centered, even during the Reagan and post-Reagan eras, on the most effective means of state intervention: whether government should provide housing directly (through subsidized construction) or indirectly (through housing vouchers). Both courses reflect doubts about the quality of the low- to moderate-income housing that the market will provide. Policymakers have assumed that such housing will be so manifestly inferior that the state must provide either substitute housing or funds.

The belief that the private housing market will victimize the poor, rather than serve them, is deeply ingrained in American public consciousness. Nearly a century after Jacob Riis reported on the condition of New York's Lower East Side (anthologizing his work as *How the Other Half Lives*), the precepts of the housing-reform movement that he inspired continue to hold sway. The movement advocated "model tenements"—philanthropic enterprises that became the inspiration for public and nonprofit housing—as well as legal restrictions on the private construction of

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multifamily structures. These restrictions evolved into zoning codes that have favored the single-family house. So powerful have these conventions proven that even as strong an advocate of supply-side economics as Jack Kemp has not considered using the private market to increase the supply of housing for the aspiring poor, choosing instead to promote tenant ownership of public-housing units.

Yet the troubled history of American public housing, the budgetary limits on federal housing subsidies, and the doubts about the upward mobility of the poor combine to suggest the need for more private low- and moderate-income housing. In the search for new programs to meet this need, it may prove worthwhile to reexamine an *old* "program" that past and present reformers have disdained, even though it effectively housed hundreds of thousands of New Englanders in durable structures that have steadily gained value.

In their heyday, the common New England three-family houses or "three-deckers"—developed by small builders, carpenters, and architects before zoning restrictions existed—succeeded remarkably in housing and helping the poor. Their spread was checked by a national campaign—partly inspired by anti-immigrant sentiment—that led to "tenement control" and zoning laws. Reconsidered today, however, privately built or minimally subsidized three-family houses offer a relatively straightforward means of increasing the housing supply, using land efficiently, and promoting upward mobility. Three-deckers, in which owner-occupants typically pay the mortgage by renting out the two other units, offer even greater economic advantages today than when first devised, thanks to the tax code. They assist those willing to become small landlords, while giving tenants the benefits of relatively inexpensive quarters in owner-occupied buildings. In addition, they may prove more palatable than public-housing projects to suburban municipalities that are pressured to accept "affordable housing." Significantly, their return has already begun.

The original triumph

To recognize the scope of the three-decker's original triumph, one must appreciate the demand for housing that accompanied New England's industrialization and concomitant population increase in the last half of the nineteenth century. The Boston area's booming mill towns were growing dramatically. Between 1870 and 1910, the combined populations of Boston, Lowell, and Worcester

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nearly tripled. Demand was so great that stables and cellars were used for housing. As in Jacob Riis's New York, tenement housing lacked bathrooms, light, and ventilation; reformers estimated that more than 1100 people, including 700 children, lived in a single one-and-a-half-acre section of one Boston street. With the spread of streetcars, open portions of cities—just beyond the borders within which fire laws prohibited wooden construction—became the sites of new housing for these teeming masses. It was in such areas that three-deckers emerged.

Their origins are obscure. A common story suggests that a financially troubled builder, lacking funds to finish off a two-family Victorian house with a Mansard roof, instead topped the structure with a flat roof and created a third floor. In any event, between 1880 and 1930 some 16,000 three-deckers went up in Boston alone. Assuming, very conservatively, that an average family of four lived in a six-room "railroad flat" (consisting of two bedrooms, a kitchen, a dining room, a parlor, and a bathroom), these three-deckers would have housed 192,000 people. In Worcester, where another six thousand were built, they are authoritatively estimated to have housed one-third of the city's 100,000 residents as late as 1972.

The past success of the three-decker remains relevant to today's housing dilemmas. In addition to using land economically, the three-family structures conserved scarce water and minimized sewer hookups. As the architectural historian Douglas Tucci has pointed out, they also struck a balance between aesthetic interests and the desperate need for more housing; in many areas, three-deckers (especially those without porches) could masquerade as single-family houses and avoid the ire of suburbanites who feared the coming of apartment buildings. Most significantly, three-deckers enabled the aspiring poor to purchase property, pay for it with the help of two monthly rents, and in the process be absorbed into the civic culture.

The virtues of the three-decker were apparent to settlement-house sociologists Robert Woods and Albert Kennedy. Writing in 1914, they described what they called the "zone of emergence" into which upwardly mobile immigrants were moving, in part because of the construction economies of three-deckers: "One cellar, one water and gas main, one plumbing shaft for three families, divide the cost of these by three for each family. The number of tenants that can be accommodated is, of course, multiplied by three and

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this is what has made possible such a large outpouring from the city proper."

Woods and Kennedy, who had closely observed conditions in Boston's immigrant port-of-entry neighborhoods, were struck by the superior living conditions in the new three-decker sections of the streetcar suburbs:

> The values which the tenant receives in this modern flat are so little short of luxurious that it is no wonder they are in demand. A flat which rents for from 20 to 25 dollars a month includes a parlor, dining room, kitchen with set tubs, cook stove with gas stove and water heater attached, two bedrooms, front and back piazza, hot air furnace, electricity and hardwood floors. Such a home so located and so fitted out, is well calculated to appeal to the ambitious clerk, mechanic and the like whose weekly wage averages in the neighborhood of twenty-five dollars.

In fact, a 1961 study of the Boston housing market over more than a century found that the average rent level for "minimum-standard housing" was lower between 1900 and 1914 than it was during the previous fifteen-year period. Such a decline was observed in only one other period of the eight for which data were compiled.

The triumph of the three-decker, however, involved more than the provision of relatively inexpensive, comfortable housing. Woods and Kennedy made clear that three-deckers encouraged entrepreneurship and the accumulation of capital on the part of both builders and buyers:

> The three-decker has, of course, attracted both the builder and the small investor as a money-making proposition. For the builder, the advantages are in large scale production inasmuch as the profit on a single house is small; but if a man builds thirty three-deckers a year and gets only three hundred dollars out of each, he has no need to complain of business. About half of these houses the builders unload as soon as possible on to families who live in one apartment and rent the other two. If a house is kept full all the time and the owner does not expect to live on his rentals, the investment is a reasonably good one.

Three-deckers also offered intangible benefits, both to individuals and to the social fabric. A 1917 survey conducted by the Worcester Planning Board found that some three-decker residents preferred their houses to single-family "workers' cottages." Among those interviewed was a "young matron" who observed: "All alone with baby, you don't know how timid I became. Now I know someone else is under the same roof, even if I don't know them very well." The "house kept full all the time" may also have helped to reinforce social norms. According to a prominent Boston builder

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who grew up in a Dorchester three-decker, for instance, the fear of somehow driving renters out of the house prompted his parents to emphasize the need for children to avoid disturbing tenants. Woods and Kennedy used grand terms to describe the impact of the three-decker on community life:

> A noticeable thing about the zone is the amount of property in the hands of immigrant people. Nearly 50 percent of the small dwellings and three-family tenements are in the hands of one-time immigrant families in relatively humble circumstances. This real estate is mortgaged in a large share of its value but it stands as a symbol that the newcomers are 'taking possession of the land.' Ownership of property is one of the surest indications that emergence is emergence, indeed.

Finally, although many three-deckers were plain box-like structures (derided in New England as "cracker boxes"), many others had high Victorian architectural features; thus the geographer Douglas Johnson, who has catalogued no fewer than seven major three-decker architectural types, asserts that "three-deckers represent a working-class image of the good life, of what the middle class, independent, home-owning life ought to be like."

The organized backlash

Neither these nor other virtues, however, did anything but forestall the success of an organized backlash against three-deckers, led by housing reformers who did not distinguish between them and the windowless cold-water tenements without private baths. The reformers' efforts foreshadowed the successful exclusionary zoning that decreased housing supply, thereby increasing the demand for state intervention in a market whose flaws "reform" helped create.

As early as 1890, the Worcester Board of Trade sounded a call against the three-decker in the city's *Columbian Tribute*:

> No one house is big enough for more than one family. This is the sentiment that should fill every mind. It may not agree with the grasping wish of the man who builds to rent.... This particular form of architectural monstrosity was conceived in avarice and born in rapacity. It is a blot on any landscape, and as it towers like an enormous dry-goods box, on our sightly hills, it goes far to wipe away the goodly impressions made by beautiful churches, school houses, and other public edifices. Such structures have no place among suburban homes. So strong is this feeling in some directions, those selling lots include in the terms that three-deckers are not allowed.

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But the important, organized, and successful drive against the three-decker was national, not local, and involved legislation, not mere deed restrictions. It was spearheaded by the New York-based National Housing Association, whose professed goals included: "To prevent the erection of unfit types of buildings, encourage the erection of proper ones and secure reasonable, scientific and economic building laws." The association prominently supported the Massachusetts "town tenement act" of 1912, which enabled municipalities to ban three-deckers. The association's journal, moreover, reported regularly and approvingly on subsequent local actions taken in Massachusetts and elsewhere in New England.

The essence of the association's case was made in 1916, when the group's annual conference explored "The Menace of the Three Decker." The spread of three-deckers, wrote Prescott F. Hall, chairman of the Town Improvement Committee of the Brookline (Mass.) Civic Society, reflected the fact that "Americans are both esthetically defective and blindly devoted to obsolete ideas as to the extent of personal liberty." Hall couched his opposition in ostensible concern for three-decker residents, whose children would lack yards and whose housing investments might ruin them financially. But the chief argument against three-deckers, and the rationale for restrictive legislation, was the fire hazard that their wooden construction and their density were said to pose.

Woods and Kennedy debunked this charge, noting that fire losses in three-decker sections were low and that "with stairways and piazzas on two ends of the house, it would be practically impossible for people to be burned alive—and thus far losses of life in three-decker fires have been infinitesimal." But this argument did not persuade the reformers. The real source of their opposition was less the construction style of three-deckers—Hall, for instance, attacked even brick three-deckers—than the nature of their builders, owners, and occupants. The reformers were clearly uncomfortable with the market processes that were bringing immigrants into the mainstream of American life. Hall blamed the spread of the three-decker on the "jerry builder," who "borrows the people's money from savings banks and trust companies" and "thus with the help of the workingman's capital is really putting in his pocket ... an extortionate reward for his work. The number of builders of this sort is increasing and they are handling an increasing share of the total housing capital. This is the primary cause of the three-decker menace and of much of our bad housing."

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Hall coupled his criticism with a desire to limit immigration. As executive secretary to the Immigration Restriction League, he forthrightly stated that immigrants threatened America's civic culture:

> Our institutions were established by a relatively homogeneous community, consisting of the best elements of population selected by the circumstances under which they came to the new world. Today, much of our immigration is an artificial selection by the transportation companies of the worst elements of European and Asiatic peoples. If the founders of the nation had been of the recent types, can we suppose for a moment this country would enjoy its present civilization?

In listing the roster of Massachusetts towns that adopted "tenement control" legislation, Hall praised this restriction of immigrants' mobility. "Arlington adopted it on account of people coming in from Cambridge and Somerville. Belmont adopted it to prevent people coming from Waltham. Swampscott adopted it to prevent people coming from Lynn." So successful was the campaign against the three-decker that by 1927 even Boston, in revising its three-year-old zoning ordinance, made construction of three-deckers impossible in its developing neighborhoods.

The National Housing Association attempted to extend such efforts, lobbying for a national Model Housing Law that would preclude construction of three-family houses.[1] But the association's opposition to three-deckers was only a small part of its housing prescription, which strongly favored publicly constructed single-family houses. The title of its pamphlet "One Million People in Small Houses" captured its dream. Thus in May 1917 the association endorsed a Massachusetts plan to appropriate $100,000 so that the state could build and own "wholesome homes for low-paid workers," which the reformers labelled "an advanced step in the field of housing betterment."

All this might be of little but historical interest had not the values of the National Housing Association so deeply taken root. But these values have been reflected in subsequent patterns of housing construction. America has precious little in between the public and subsidized housing projects in its cities and the single-

[1] Lawrence Veiller, the author of the model-housing law and the secretary of the association, resigned from a major philanthropic housing committee—the Tenement House Committee of the Charity Organization Society—rather than support New York state legislation legalizing the conversion of single-family dwellings into three-family homes that were not considered tenements for regulatory purposes.

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family homes in its suburbs. In discussing the end of new three-decker construction by 1930, the economist Lloyd Rodwin wrote: "No substitute new middle-income housing took their place." For a time America did not feel the effects of the absence of middle-income housing. Postwar prosperity, rising real incomes, low interest rates, and federal insurance programs masked the problem. Indeed, the urban-renewal advocates of the 1960s targeted many existing three-deckers for destruction. But the current shortage of "affordable" housing—which makes home ownership difficult even for some children of the middle class, not to mention public-housing residents—has revealed the problem's scope. If zoning and regulatory barriers could be overcome, the three-decker—in one form or another—could again balance competing needs and interests while increasing the supply of affordable housing.

Benefits for blue-collar families

Three-deckers continue to play a major role in the Boston real-estate market, with blacks, Hispanics, and Asians now buying three-deckers that were once sold to Irish, Italian, or Jewish buyers. For purposes of comparison, Table I examines the monthly costs of two houses on the same street that were advertised for sale during the same week in recent newspaper real-estate listings. The houses are in a well-kept, blue-collar, racially mixed section of the city's Dorchester district; one is a six-room single-family home listed at $149,000, and the other is a three-decker with two six-room floors and one seven-room floor.

Table I: Costs of Home Ownership (in dollars)

	Single-family house	*Three-decker*
Price:	149,000	225,000
Down Payment (5 percent):	7,450	11,250
Mortgage Principal (12 percent, thirty year):	141,550	213,750
Monthly Payment (principal and interest):	1,457	2,199
Annual Property Taxes (rate=1.077 percent):	1,192	2,302
Monthly Property-Tax Payment:	99	192
Monthly Rental Income ($650 per unit):	0	1,300
Net Monthly Carrying Cost:	1,556	1,091
Required Nonrental Annual Family Income (housing cost as 30 percent of income):	62,240	43,640

This financial comparison, favorable as it is to the three-decker, nonetheless understates the three-decker's advantages. The three-

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decker owner will enjoy significant federal-tax benefits, including deductions for depreciation and repairs. Assuming depreciation over thirty years and annual repair and renovation costs equivalent to just 1 percent of the house's value—repairs that the owner of an older single-family home may very well have to make too—the three-decker's advantage is even greater:

Table II: Tax Benefits of Home Ownership (in dollars)

	Single-family house	*Three-decker*
Gross Income:	62,240	59,240
Tax Liability on Gross Income (family of four):	13,559	12,719
Deductible Principal and Interest:	17,484	26,388
Deductible Property Taxes:	1,192	2,301
Deductible Annual Repairs:	0	1,500
Deductible Depreciation (30 year, straight line):	0	5,000
Adjusted Gross Income:	43,564	24,081
Tax Liability on Adjusted Gross Income:	8,334	3,611
Dollar Value of Adjustments to Gross Income:	5,225	9,108

It is clear that most blue-collar families, particularly those with two wage-earners, can afford to purchase a three-decker. Indeed, some three-deckers in Boston sell for considerably less than $225,000. It is not uncommon to find one priced as low as $150,000—expensive in some parts of the country, but not in Boston's high-priced real-estate market.[2] The affordability of the three-decker, moreover, is maintained by the existing tax structure rather than by politically sensitive subsidies.

It is true, of course, that the above calculations make significant assumptions about one's credit rating and ability to make a down payment. But government programs can help. Thus the Massachusetts city of Lawrence, which has a large three-decker stock and a recent influx of Hispanic immigrants, has begun a successful revolving public-loan fund to help buyers with down payments. In promoting the program, the city's director of neighborhood planning asserts: "Resident ownership of existing triple-deckers is more cost-effective than assisted rental production. It also creates self-reliance for families, since it is not based on the Section 8 rent subsidies.... Not surprisingly, crime has diminished substantially in areas touched by this approach."

[2]The median price for a single-family home in Boston and seven bordering inner-ring municipalities was $162,000 in March 1989.

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Even when three-decker *owners* need not rely on continuing subsidies, however, the three-decker can provide housing for subsidized *tenants* in a setting likely to be better maintained than public housing. Rent levels for two- and three-bedroom units in three-deckers appear to fall within Department of Housing and Urban Development (HUD) guidelines, which permit a family of four earning up to $34,000 to receive a subsidy for an apartment costing as much as $803 a month. Thus three-deckers can provide housing for those with low to moderate incomes.

The three-decker has not only survived—despite all that was said against it two generations ago—but continues to prove its vitality. In fact, its advantages have prompted interest in constructing new three-deckers, for the first time since the late 1920s. In a 1988 report, the Housing Committee of the Boston Society of Architects endorsed the general concept of new homes with rental apartments; it supported two-family homes but endorsed three-deckers even more strongly: "In addition to providing much needed rental housing, even a modest rental income from owner-occupied two-family homes can make them affordable to low-income residents.... Construction of a three-family, rather than two-family, house on a given site can optimize the land value."

Taking such advice to heart, the city of Boston has begun a program to build new three-deckers on many of some 747 vacant "buildable lots," offering buyers the land for only a dollar in order to keep costs and prices low. Boston has even commissioned new three-decker designs, offering to set aside construction sites for the winning designer. (The competition was won by an architect who proposed reconfiguring the traditional three-decker so that the top two units were split-level, with the second and third floors divided vertically.) The city has specified that, outside of the contribution of land, "no additional subsidies from the City will be available to the developer." But under the buildable-lots program, new three-deckers have been built for as little as $213,000. Boston has chosen to require that the three-decker units be sold individually as condominiums and has successfully required developers to sell two-bedroom units for $70,000-$75,000, three-bedroom units for $80,000-$85,000, and four-bedroom units for $85,000-$90,000—well below the median Boston-area condominium price of $132,000. The city reports that buyers with incomes in the $25,000-$30,000 range have purchased some of the fifty-four new three-decker units that have gone up on the buildable lots.

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Barriers to construction

Nonetheless, the Boston zoning code still prohibits the construction of three-deckers even where they once stood. New three-deckers require no less than five zoning variances—including one to permit the construction of a multi-family house. The other variances are necessary to circumvent zoning laws designed in other ways to limit density, such as requirements for parking spaces and for front-, rear-, and side-yard setbacks. These barriers are not unique to Boston; in most developing suburban areas, exclusive single-family districts and large lot-size requirements are common. A July 1983 survey by former American Planning Association president Richard Babcock, for instance, found that there remained 33,000 acres of vacant residential land in southwest Connecticut, most of it zoned for lots of at least one acre. The same survey found some 60,500 acres "zoned single-family and usable" in Topeka, Kansas, and 6,500 vacant acres zoned exclusively single-family even in the old and built-up city of New Orleans. "There is no valid reason," writes Babcock,

> why freestanding houses with their own yards and four exposed walls must be constructed on this land or on the hundreds of thousands of vacant acres in urban areas.... In view of modern building codes and design standards, the shibboleths of the 1920s are no longer valid. The danger of the spread of infectious diseases, the loss of light and air, the increase in fire hazards and crime, strike one (in retrospect) as a tad overblown today.

Apart from zoning barriers, there is also a cultural barrier to three-decker construction. We hesitate to encourage the growth of a new class of landlords. The old reform instincts run deep, supporting the idea that there is something immoral about profiting from the provision of housing. We are loath to acknowledge that some people might prefer to be landlords—and some to be tenants.

Thus latter-day reformers continue to find reasons to criticize three-deckers. The architectural historian Samuel Bass Warner, whose book *Streetcar Suburbs* partly charted their growth, has singled three-deckers out for criticism in his discussion of contemporary housing policy. In apparent reference to reductions in federal housing-construction subsidies, Warner has said that

> because of various national policies, we don't have as much money for housing as we should. As a result we are preserving structures that perhaps shouldn't be preserved .... [such as] three-deckers, which are built side by side, with four feet between them, [and] were the bottom of

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> the housing market of the 1890s. And now we're going in and re-siding them and propping them up because, in our desperate situation, they look like good housing.

Such is the failed conventional view—that extensive subsidies are necessary if housing is to be affordable. It may well be true that, at the very bottom of the housing market, government intervention is the only means to ensure construction of housing that meets legal and community standards. The three-decker demonstrates, however, that this need not be the case in "the zone of emergence"—such as today's growing exurban areas facing labor shortages.

Such areas might even embrace three-deckers—or at least permit their construction in select districts. As in years past, three-deckers still manage to bring needed labor to growing municipalities, while remaining politically more acceptable than subsidized apartment complexes. The political reaction in Yonkers, for instance, would have been very different had Yonkers proposed to resolve its legal difficulties by setting aside land for the construction of owner-occupied three-family homes (or had it been permitted to do so by the courts).

Still, the essential strength of three-deckers lies in providing relatively inexpensive housing for home owners who are upwardly mobile, as well as well-maintained apartments for lower-income tenants. Local zoning laws pose the key obstacle to realizing these benefits. HUD, however, can offer a bully pulpit from which to encourage three-decker construction. Such a goal would fit well into HUD's existing Joint Venture for Affordable Housing, which offers technical support (not subsidies) to communities that agree to higher-density housing. The program might point to the models developed in Boston for new three-deckers. With modest relaxation in zoning controls, it is also possible that other forms of housing not yet conceived might provide dwellings for those of modest income. No one, after all, really planned the three-decker—but it has worked.

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The work ethic—then and now

SEYMOUR MARTIN LIPSET

BELIEFS about the work ethic vary over time and place. There is, however, a general inclination for older people to believe that things were better—or at least more moral, more decent—when they were young. As Adriano Tilgher, a historian of work, wrote in 1931, "Every country resounds to the lament that the work-force does not burn in the younger generation, the post-war generation."

The affluent generally complain that their subordinates, the less privileged, do not work hard and have lost the work ethic. A survey of members of the American Management Association found that 79 percent agreed that "the nation's productivity is suffering because the traditional American work ethic has eroded." But this is an old story. Harold Wilensky notes that in 1495 the English Parliament passed a statute on working hours and justified it in the following preamble: "Diverse artificers and labourers ... waste much part of the day ... in late coming unto their work, early departing therefrom, long sitting at breakfast, at their dinner and noon meal, and long time of sleep in afternoon."

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The idea that people should work hard—because doing so is virtuous, because it advances the common good, or even because it lets them accumulate wealth—is a relatively recent one. Since work is difficult, the question is not why people goof off, but rather why—in the absence of compulsion—they work hard. The Soviets, East Europeans, and many Third World people know this. Gorbachev is even now trying to create a work ethic.

Historical perspectives

The ancient history of the human race speaks eloquently to the inherent disdain for work. The Greeks regarded work as a curse. As Tilgher observed, Homer wrote that the gods "hate mankind and out of spite condemned men to toil." Manual work was for slaves, and both the Greeks and the Romans scorned free people who did it. The Bible, in the words of the British scholar Michael Rose, portrays work as "a curse devised by God explicitly to punish the disobedience and ingratitude of Adam and Eve," a "painful drudgery" necessitated by the original sin. The Talmud too, Tilgher noted, teaches that "if man does not find his food like animals and birds but must earn it, that is due to sin." The Jews drastically changed their understanding of God's will, but did so only later.

Early Christianity shared the ancient Hebrew view of work. The one justification for amassing wealth was to dispense charity. Given medieval Christianity's disdain for work, as well as for interest, usury, and profit, how was it possible to get people to work hard, to accumulate capital, to accept the logic of capitalism?

Protestantism brought about a major shift in attitudes. Martin Luther, like earlier heretics, emphasized that people could serve God through work; he argued that the professions were useful, that people should try to work well. But he had contempt for trade, commerce, and finance, because he did not believe that they involved real work. Hence Luther did not directly pave the way for a rational profit-oriented economic system. Furthermore, he continued to approve of the static class structure of feudalism, opposing people's efforts to improve their stations in life.

Max Weber contended that Calvinism produced a new attitude toward labor. In the Calvinist view, it is the will of God that all must work; work is accordingly methodical, disciplined, and rational; it is morally justified even though oriented toward profit and mobility. Calvinists also concluded that earnings must be reinvested *ad infinitum*. Weber linked this revolutionary view to the

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doctrine of predestination: the only way to find out if you were predestined to Heaven was to succeed on earth, thereby demonstrating that you were one of the Elect. Hence being charitable and helping others to rise violated God's will.

These beliefs were secularized, as Robert Merton notes, into a system of "socially patterned interests, motivations and behavior" that were functionally related to emphases on rationality, hard work, and the accumulation of wealth. These values in turn led to increased productivity and capital growth. The main exponents of the new attitude were the Protestant sects, not the state churches that incorporated the norms of medieval hierarchy. And the one major country that has been dominated by the Protestant sects is America. In his classic work *The Protestant Ethic and the Spirit of Capitalism*, Weber's principal example of the spirit of capitalism was found in the writings of Benjamin Franklin. Weber and others, of course, pointed to the role of Calvinists such as the English Puritans, the French Huguenots, and the Swiss and the Dutch Reformed in fostering economic growth elsewhere; of these groups, however, only the Dutch Reformed made up a majority in their country.

But does the United States still have the work ethic that it had when Max Weber visited in 1893? A decade and a half ago, a widely cited volume called *Work in America,* produced by a task force of the Department of Health, Education, and Welfare, popularized the argument that the work ethic has declined. The study contended that "significant numbers of Americans are dissatisfied with the quality of their working lives. Dull, repetitive, seemingly meaningless tasks are causing discontent among workers at all occupational levels."

This conclusion is simply not sustained by the available evidence. While I have few doubts that the work ethic is less prominent now than it was in the nineteenth century, the available facts do not justify bad-mouthing it. As the March 1989 issue of *Psychology Today* notes, in the 1950s a number of sociologists predicted that Americans would increasingly choose to emphasize leisure and to abandon work—and were proven entirely wrong. To quote George Harris and Robert Trotter: "Work has become our intoxicant and Americans are working harder than ever before. In the past 15 years, the typical adult's leisure time has shrunk by 40%—down from 26.6 to 16.6 hours a week. And the work week, after decades of getting shorter, is suddenly 15% longer." They

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note that "the average adult now pumps 46.8 hours per week into school, work and commuting—way above the 40.6 hours logged in 1973." It is true that people worked fifty-three hours per week in 1900, whereas they now average around thirty-nine, but this number has remained fairly constant since 1945.

Attitudes toward work

One reason that more Americans have not substituted leisure for work may be that most of us like our jobs. In a 1973 Roper survey, 85 percent of the respondents said that they were satisfied with their field of work, whereas only 14 percent were dissatisfied. The corresponding figures for 1980 and 1985 show virtually no change. The National Opinion Research Center (NORC) reports almost identical results in response to the question: "How satisfied are you with the work you do?" The same average percentage—85—answered that they were satisfied for the years 1972-1982. Indeed, the percentage was up a bit in 1988, when 87 percent gave this answer. NORC has also posed a tougher question: "If you were to get enough money to live as comfortably as you like for the rest of your life, would you continue to work or would you stop working?" On average, 70 percent of the respondents questioned during the 1972-1982 period claimed that they would continue to work; the figure for 1983-1987 rose to 74 percent, and in 1988 it jumped to 85 percent. Daniel Yankelovich reports similar results.

Almost all surveys indicate that the vast majority of Americans—over 80 percent—are satisfied with their jobs. There has been no significant change in these figures over time. Many people, of course, do object to specific aspects of their jobs, complaining about boredom, pay, opportunity for advancement, the way that work is organized, and so forth.

Yankelovich reports that almost 90 percent of all American workers say that it is important to work hard; 78 percent indicate an inner need to do their very best. His research also suggests that the motives driving people to work have changed; the proportion saying that they work primarily or solely for money has declined, while the younger and better educated emphasize the expressive side of work. To summarize Yankelovich, such workers increasingly believe that work, rather than leisure, can give them what they are looking for: an outlet for self-expression as well as material rewards. Roper indicates that when asked whether work or leisure is more important, many more Americans choose work

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than choose leisure: 46 percent to 33 percent in 1985. This figure has hardly changed since the seventies; it was 48 percent to 36 percent in both 1975 and 1980.

The results, curiously, do not vary by occupational level or education, but they do confirm other traditional assumptions: Protestants value work more than Catholics (53 percent to 43 percent), conservatives more than liberals (55 percent to 39 percent) and older people more than younger.

And even the young do not seem to scorn work. The report of a 1983 international study of youth sponsored by the Organization for Economic Cooperation and Development concludes that "[f]ears that the 'work ethic' is being rejected by young people do not seem well-founded." An earlier cross-national poll conducted under the auspices of Japan's Youth Bureau (1978) in eleven countries found that youths aged eighteen to twenty-four were highly satisfied with their jobs.

Work behavior

Responses to pollsters may not be the best indicators of underlying feelings, since people may bow to prevailing norms rather than invite embarrassing questions. In the U.S., with its great emphasis on individual choice, they might fear being asked: If you do not like your work, if you are not happy on the job, then what are you doing there? But data about productivity, retirement, and absenteeism rates should indicate sentiments toward work fairly accurately.

Such statistics confirm the opinion-survey results. In the words of one study, they indicate "a sustained period of strong productivity growth" between 1948 and 1973, with an annual 2.5-percent increase in labor productivity in manufacturing. It is true that this rate fell off drastically between 1973 and 1979, dipping down to 1.5 percent, and that for the economy generally it was only 0.6 percent during this period. Yet concern about this drop-off, which resulted in many books and articles, was misplaced. The drop-off apparently resulted from an increase in the proportion of young and inexperienced workers. But changes in the capital-labor ratio and in the composition of the labor force (with the hiring of more-experienced and better-educated workers) soon reversed the trend.

From 1979 to the present, the productivity growth rate has largely recovered—particularly in manufacturing, where it is reported to have "surpassed the pre-1973 rates." The average mean

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gain from 1984 to 1987 was 3.4 percent, about the same as in Japan; only Britain has had a higher average among developed countries.

Nor does America's drop-off in the seventies appear to have been caused by internal factors. Productivity growth in almost all industrial countries slowed down after 1973. Indeed, as one research team observes, "only the United States and the United Kingdom have had productivity growth rates since 1979 that match or exceed their pre-1973 trend rates."

Analyses of absenteeism show the same pattern as those of productivity. Data collected over twenty years in the sixties and seventies indicate very little change in sick-leave rates in America. They certainly do not support a thesis of weakening job commitment. The rates vary, of course, by age and occupation: the young have more short leaves (and the old have more long ones) than the middle-aged; professionals and executives have fewer sick leaves than white-collar employees, who in turn are absent less frequently than manual workers. Cross-national figures from the late seventies indicate that absenteeism rates are lower in the U.S. than in all other industrialized countries but Japan. What is more, the differences between Japan and America are comparatively small; the rate for Japan is 2 percent, while America's is 3.5 percent. By contrast, West Germany's rate is 8 percent, as is France's; Italy's is 11 percent, the Netherlands' is 12 percent, and Sweden's is 14 percent. American research, too, does not reveal any secular increase in absenteeism.

Retirement rates are another relevant statistic. Studies conducted from the sixties to the eighties in five countries—Britain, France, West Germany, Japan, and the U.S.—reveal that each country has seen steady increases in the proportion retiring or not employed. The U.S. is second to Japan, albeit by a considerable margin, in the percentage of people aged sixty-five or more who remain on the job: 18 percent are still working here, compared with 41 percent across the Pacific. But a higher proportion of older people in America remain employed than in Britain (9 percent), West Germany (6.5 percent), or France (6 percent). These rates are, of course, affected by pension systems. It should be noted that Japan has by far the worst provisions for its elderly, who face more severe economic constraints than Americans.

Naturally, there have been changes over the years. While the Protestant ethic may have motivated much of the population to

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work hard prior to this century, economic need and the scarcity of resources also played major roles. The affluence of postwar America and northern Europe has reduced the impact of the lash of necessity. And the increase in the number of jobs that require educational achievements may have greatly reduced the work morale of the lowly and the unskilled—many of whom are immigrants and minorities.

Still, *Reworking the Work Ethic*, Rose's comprehensive book, concludes that there has been no general decline in adherence to the work ethic. Rose contends that the growth in the belief in the decline stems from the attitudes (dating from the 1960s) of students and intellectuals who themselves disdain manual work. Like Yankelovich, Rose does note a differential reconstruction of work values, with increased emphases on more interesting work, more participation, and less managerial control. As Harold Wilensky stresses: "The leisure-oriented society is a myth. Despite talk of the decline of the 'work ethic' and in the face of affluence for the majority, modern populations remain busy—with some groups becoming busier while others are condemned to forced leisure." Herbert Gans, recent president of the American Sociological Association, also notes that the research evidence indicates that "more people are doing work in which they have pride of craft today than ever before."

Economic evidence

Given the nature and size of the trade deficit, and the success of the Japanese and the newly industrialized East Asian countries in penetrating our markets, my optimism may seem questionable. But I am talking about the work ethic, not about American trade, investment, or savings practices. It is true that the Japanese have maintained or increased their market shares, even though the relative production costs of their goods in dollars have skyrocketed. But this is because the Japanese aim to maximize market shares; they are willing to forgo profits now if doing so will help them in the long run. Their ratio of national savings to gross domestic product is twice as much as ours; they pay lower dividends, their executives receive lower salaries relative to workers' incomes, and—not least—their government and business practices operate to keep imports low. (The United States and Canada, on the other hand, are the two major economies most open to imports, and closest to following free-trade policies.)

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But America is not failing. If it were, there would not be extensive investments in this country from Japan, Britain, Canada, and others, and the domestic investment rate for the eighties would not have risen above the average of the previous forty years. The United States still has the highest real per-capita income of any country in the world, other than some Arab oil-producing states. In any case, as Charles Morris noted in the *New York Times Magazine*, "Americans earned about $20 billion a year more on their foreign assets than foreigners did on their American assets." Much of our sense of malaise is created by accounting practices that lead us to underestimate our national assets.

This does not mean that we face no real problems. We have a sizable underclass; an increasing proportion of our children are living in poverty; our educational system has major difficulties; funds to replace our rotting infrastructure are difficult to find; and addiction to hard drugs is growing. But these are consequences of our social, economic, and political systems, not of low labor productivity or poor work morale.

There have, of course, been changes in the work ethic. As compared with the nineteenth century, or even the 1920s, America (like other affluent countries) has become more leisure-oriented. The proportion of the work force in manual employment and in manufacturing has declined considerably, while the scientific-technological, communications, and educational sectors have grown enormously. But some of these trends—including the immigration of millions of people with an extraordinary commitment to work—should lead to an increase in productivity.

While the old-time Protestant ethic is weaker, it is still much stronger here than elsewhere. Of Christian industrialized countries, America remains the most religious and observant one, with the most believers in fundamentalist and evangelical doctrines.

If social mobility is good for hard work, the objective data indicate that opportunity to rise is greater than ever, as a result of occupational shifts and economic prosperity during almost all of the postwar era. The opinion surveys report that the overwhelming majority of Americans believe that either they or their children (or both) can rise, that hard work and study are rewarded. These beliefs are stronger than ever.

Finally, as Samuel Huntington has pointed out, the American economy as a whole has not been doing that badly, even when compared to the Japanese. In fact, "the most notable [recent]

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decline in gross domestic product growth was that of Japan: its average annual growth rate between 1980 and 1986 was 58.7 percent of what it had been between 1965 and 1980. In contrast, the U.S. average annual growth rate in 1980-86 was 110.7 percent of what it had been in 1965-80." Between 1970 and 1987 the American share of the gross world product has held steady (between 22 and 25 percent), as has its portion of world exports generally (around 10 percent) and of technology-intensive products (about one quarter).

Thus I cannot confirm the fears (or hopes) of the pessimists. As I read it, the evidence reinforces the conclusions of the English scholar, R.E. Pahl: "The work ethic is alive and well: people enjoy working and there is plenty to do."

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The "Japanization" of America?

STEVEN KELMAN

ONE NIGHT during the week of the October 1987 stock-market crash, I turned on a late-night local newscast and saw an astounding lead story. It was a live report from a correspondent in Tokyo about the level of the Tokyo stock exchange (which because of the time difference had already opened for the following day's trading); the report illustrated a profound change in the American national consciousness. Ten years ago, it is fair to assume, few viewers of the local news would have known that Tokyo even had a stock market, let alone that its price movements affected Americans.

Similarly, Americans of the 1970s would not have known what to make of the "Southeast U.S.-Japan Association," whose meeting in Tokyo two weeks before the crash was described as follows in the *National Journal*:

> In the halcyon days of American economic dominance, few would have thought it would come to this. The governors of six southeastern states—Alabama, Georgia, North Carolina, South Carolina, Tennessee, and Virginia—were standing solemnly for the playing of the Japanese national anthem before they set out to practically beg for Japanese investment for their home states.

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The report referred to the governors' request as a "hat-in-hand performance."

The spread of America's psychological sense of dependence on foreigners and on the outside world will be one of the lasting legacies of the 1980s. To be sure, Americans in the postwar years have often felt that foreigners could harm us; we have worried about a Soviet threat, and we have believed that small nations like Iran or Cuba were pushing us around. But those long-standing anxieties differ from the newer feelings of dependence in three respects. Where we once worried that Iranians or Cubans might push us around in Iran or in Cuba, or that the Soviets might conquer some far-off land, we now worry about the influence of foreigners over the United States itself. In addition, the older anxieties centered around enemies, and thus were in important senses easier to deal with than our newer troubles with friends. Finally, the people who traditionally worried about our being pushed around tended to think that our problem was not an inability to assert ourselves, but rather a wimpish unwillingness to do so; they felt that an America that fought back would come back. While some today believe that wimpishness is to blame for America's trade woes, many others now think that the problem is lack of ability.

The foreign economic presence in the United States has grown significantly during the 1980s. Although foreign-owned firms still employ only about one of every thirty private-sector workers in the United States, foreign investment in America has increased dramatically. The dollar value of foreign investment in American productive facilities nearly tripled between 1980 and 1987, reaching $30.5 billion in 1987. The total value of foreign direct investment in the United States in 1987 was $262 billion, a figure that approaches the reported value of American direct investment abroad—although this comparison is misleading, since investments are valued at their original cost rather than their current value and American investments abroad are generally older than foreign investments here. In addition to direct investment in productive facilities, foreign holdings of American bonds, especially U.S. Treasury bonds, have increased dramatically as well.

Government spokesmen during the Reagan years argued that the increased foreign presence in the United States showed foreigners' confidence in our country's future, an indication that it was again "morning in America." Democrats, however, argued that the country was being put up for sale to foreigners to finance

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the consumption binge of the Reagan years, and have predicted instead a "morning-after in America." The conservative Republican strategist Kevin Phillips, a populist who often criticizes Republican snuggling up to the economic establishment, has claimed that Japanese influence over American politics "is going to be a big domestic political issue for the last fifteen years of the century."

To understand the significance of the growing foreign presence, Americans must realize that the United States is simply arriving at a situation that the rest of the world has accepted for a long time. For years, other countries—not just in the Third World but also Canada, Australia, and our European allies—have had to live with foreign takeovers of important domestic industries, with foreign investment in their economies, and with the resulting precariousness of their national economic policies. National firms, national governments, and national cultures have been jolted everywhere by a tide of internationalization: foreign producers who are superior to their domestic counterparts have taken over their markets. In short, the internationalization that Americans have come to experience is not new. What *is* new is that American exceptionalism has expired. Previously, the United States was more the source than the object of internationalization; it was we who broke down walls in other lands with our appealing products, our appealing ways of running businesses, and our appealing culture. Now America is no longer simply the internationalizer, but also the internationalized.

The familiarity of our predicament becomes evident if one reconsiders a largely forgotten book that received much attention twenty years ago—*The American Challenge* by the Frenchman Jean-Jacques Servan-Schreiber. Servan-Schreiber's book was both a warning klaxon and a call to action. Its analysis of the growing American economic influence in Europe bears uncanny similarities to recent American books such as Robert Reich's *The Next American Frontier*, published in 1983, and Martin and Susan Tolchin's *Buying Into America*, published in 1988.

The American Challenge painted a grim picture of what the author menacingly referred to as a "flood" of American investment, an "assault" on Europe, and even a "conquest." Servan-Schreiber thought that Europeans could respond only by adopting the American traits that he admired—an ability to work together in teams, an emphasis on the long rather than the short term, and cooperation between business and government in moving industry forward.

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His ultimate fear, however, was not economic decay but political and cultural violation. "By extrapolating present trends," he stated, "it seems clear that we Europeans cannot hope to participate fully in [the] world of the future. This does not mean we will be poor; probably we will grow even richer. We will be overtaken and dominated, for the first time in our history, by a more advanced civilization." He concluded:

> Today's generation faces a ... choice of building an independent Europe or letting it become an annex of the United States.... Naturally there will not be any "American committee" to administer Europe.... Citizens would continue to vote, trade unions to strike, and parliaments to deliberate. But it would all take place in a vacuum. With our growth rate, our investment priorities, and the distribution of our national income determined by the United States, it is not even necessary to imagine secret meetings between Wall Street bankers and European cabinet ministers to understand that the areas that really count would lie outside the democratic process....
>
> American capital and American management will not stop short at the gates of our society.... They will ... control the firms that dominate the market in publishing, the press, phonograph recording, and television production. The formulas ... of our cultural "messages" would be imported. Our system of education—in the large sense of channels of communication by which customs are transmitted and ways of life and thought formulated—would be controlled from the outside.

Internationalization comes to America

The new American sensibility parallels Servan-Schreiber's earlier fears, and—as is so often the case—popular culture illustrates the shift. Thus the 1986 comedy *Gung Ho*, directed by Ron Howard, has a very different setting than Howard's earlier television series "Happy Days." While "Happy Days" portrayed the comfortable, confident years of the late 1950s, *Gung Ho* takes place in a small Pennsylvania town after the local underpants factory and auto plant have closed. In desperation, the town sends a local worker to Japan, who successfully begs a Japanese auto company to set up shop.

The arrival of the Japanese to set up the factory reveals the town's dependence and subordination, if in a somewhat farcical manner. The Japanese are welcomed by a marching band and a large contingent from the town, dutifully waving Japanese and American flags. A band of high school boys has dressed up in karate garb to impress the new arrivals. When the Japanese take their shoes off to walk on the red carpet that has been rolled out

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for them, the town's mayor, after a moment of confusion and hesitation, does the same.

Gung Ho is also filled with jokes about America's lost technological dominance. The worker who goes to Japan, for instance, lugs with him an old-fashioned home movie screen to show slides that he hopes will persuade the Japanese to open a plant in the town. But the Japanese regard his screen as a relic; after brushing it aside, they flick a single switch to set in motion a high-tech display with dimmed light, a screen appearing from behind a wall, and a synthetic-sounding female voice speaking Japanese. Later in the movie, some Japanese engineers in the plant are sitting in an office working on a car design when one of the wheels on their mock-up falls off. "American car," one of them says with a laugh, and the entire office dissolves in guffaws. This self-deprecating humor is reminiscent of British self-deprecation in the face of American economic dominance, which permeated the Beatles' 1966 movie *Help!* The British mad scientist in that movie was constantly dismayed at the failure of British technology to help him dislodge Ringo Starr's ring, finally resorting to a German Luger and to a contraption about which he exclaims, "This should work, it's from Harvard."

The contrast presented in *Gung Ho* between American and Japanese cultures strikingly resembles the one drawn by fearful Europeans between European and American cultures. The movie presents Japanese culture as monomaniacally oriented toward toil and sacrifice for one's company. The Japanese plant manager is so busy working at home on company business that he has no time to assemble a bicycle that his wife bought for their son's birthday, and another Japanese whose wife is in labor is not allowed to leave work to be with her. The American workers, by contrast, run into problems with their new Japanese bosses because they care about living a full life, not just about working ceaselessly. The Japanese prohibit the Americans from listening to rock music or smoking cigars in the plant. "I'm sorry," says the Japanese foreman, "no music, no cigars. Just work." When the Japanese wife asks her husband why American fathers have time to assemble their children's bicycles, the exasperated plant manager replies, "Because their work sucks." The Americans in the movie may be a bit lazy and goofy, but they have the right priorities—they care about family and friends. *Gung Ho* does not portray the raucous and beer-drinking American workers in the movie as being, *à l'européen*, too

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civilized to share the crude, single-minded obsession of the foreign conquerors; nonetheless, the movie does suggest, very much in one sort of European spirit, that if Japan is taking over it is not so much because Americans cannot compete as because they choose not to, so as to maintain a saner way of life.

Like movies, the consumer products that we buy are an important part of our popular culture. The spread outside America of Coca-Cola and Levi's, and later of McDonald's, symbolized for many the external world's growing dependence on America. When I was growing up in the fifties, few imported consumer products other than Scotch and Canadian whiskeys impinged much on our consciousness; about the only thing that comes to mind, and this very much from a child's viewpoint, was Pez candy from Austria. And only three foreign companies in the United States produced brand-name products of any significance—Nestle with chocolate bars, Shell with gasoline, and Lever Brothers (the American subsidiary of Unilever) with Lipton tea, Lux soap, All laundry detergent, and a few other brands.

To the extent that we are what we buy, our identity has of course now become much more influenced by foreigners. Cars no longer mean only Chevrolet, Ford, or Cadillac, but also Toyota, Volvo, and even Hyundai; televison sets no longer mean Zenith or Philco, but mainly Sony, Panasonic, and Hitachi. Beyond those brands are the Lacoste shirts, the Beck's beer, the Conran's home furnishings. In addition to imports, foreign brands produced in the United States now range from Schweppes mixers to Kikkoman soy sauce. And there has more recently begun a serious growth of foreign takeovers of American brand names—Firestone tires, A & P supermarkets, Bloomingdale's department stores, CBS Records, Pillsbury (with brands ranging from Pillsbury cake mix to Green Giant vegetables to Burger King), and, most recently, Columbia Pictures and part of Rockefeller Center. The takeover of Pillsbury by Grand Metropolitan of England has produced this ironic result: since Häagen-Dazs ice cream had been purchased by Pillsbury several years ago, that super-premium American brand (which took advantage of Americans' taste for things foreign by passing itself off as an imported product) now actually *is* foreign-owned!

The Japan obsession

Although Europe's direct investment presence in the United States is still considerably greater than Japan's (even in the most

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recent years, net new direct investment from Britain has been larger than from Japan), our growing sense of dependence on foreigners centers on Japan. What has developed into America's current obsession with Japan began innocently enough, with the publication in the 1960s and early 1970s of admiring though sometimes condescending accounts of the rapidity of Japan's economic progress. Later, though, the obsession truly took hold, as the Japanese actually began beating the United States at all sorts of things—most dramatically, in the late 1970s, in producing that American symbol, the automobile. In 1979 the Harvard sociologist Ezra Vogel published *Japan as Number One*, which received some attention in the United States and was a bestseller in Japan; observers in both countries, however, thought that the book overstated its case. By 1981 the Japanese-American business professor William Ouchi had published the first of a spate of books on how Americans could learn from Japanese management practices, and in 1983 Robert Reich's *The Next American Frontier* extended to government policy the search for Japanese prescriptions for American ills.

At around the same time—with the growing American trade deficit, the problems in old-line American manufacturing industries, and the resulting frictions over trade—American attitudes toward Japan began to shift from the earlier admiring curiosity and the newer admiring jealousy to an obsessive anxiety. Japan was beating the United States at everything it set its mind to; America appeared to be headed downhill. If the earlier symbol for the Japanese juggernaut was its victory in the automobile market, by the mid-1980s the symbol had become the Japanese assault on the semiconductor and (to a lesser extent) computer industries, regarded as the last bastion of a tottering fortress America. American super-sensitivity to evidence of Japanese domination caused a row when a Japanese firm tried to purchase Fairchild Semiconductor, a large but not particularly profitable old-line semiconductor company. It was unacceptable, the cry arose, for a producer of high-technology products used for national defense to fall into foreign hands. The problem with this argument was that Fairchild Semiconductor already was in foreign hands, having been purchased several years earlier by a French company. "Foreign" meant Japanese.

The latest major entry into the ranks of books on the rise of Japan was the 1988 bestseller *The Rise and Fall of the Great Pow-*

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ers, which had a more ominous because more encompassing theme. Written by the British-born but Yale-residing historian Paul Kennedy, the book was an unlikely commercial success, a 540-page textbook-like account of the succession of European wars since 1500. The first printing of the book was a modest 10,000—raised from the planned 7,500 because of a hunch by the book's editor that "it might take off." *The Rise and Fall of the Great Powers* ended up on the bestseller list for several months, selling several hundred thousand copies.

It is likely that many of the book's readers skipped much of Kennedy's depressing chronicle of endless aggression and bloodshed to arrive at page 438, the beginning of the last chapter, entitled "To the Twenty-first Century." Here Kennedy presented an avowedly speculative survey of important trends facing the major world powers—the United States, the Soviet Union, Europe, China, and Japan. He developed twin themes, growing out of his reading of the fate of great powers over the last five hundred years. The first theme was that since the ability to wage a successful protracted war depends on superior economic resources, so does the ability to reach the top of the great-power heap and to remain there. The second theme was that dominant great powers tend to generate their own decline by making excessive military commitments (due to their very dominance) that consume resources better spent on promoting a strong economy.

Kennedy's book added a frightening new dimension to the Japan obsession: Japan's rise might not only displace the United States from its preeminent economic status, but also affect America's status as the leading power. This fear arose even though Kennedy considered the Soviet Union likely to be beset by increased economic stagnation and ethnic disintegration, and concluded that America's problems "are probably nowhere near as great as those of its Soviet rival." It is a measure of current American attitudes that Kennedy's view of the Soviet Union received almost no attention; people focused instead on America's difficulties in competing with a rising Japan. Some professors and politicians had been saying for years that the old East-West confrontation was being replaced, or at least supplemented, by a North-South struggle between the rich and the poor; but that message had rooted itself only dimly and partially in the national consciousness. Suddenly, however, people were much more willing to believe that the real struggle for great-power dominance was no longer between the United

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States and its ideological enemy the Soviet Union, but between the United States and its economic competitor Japan. Even before the recent events in Eastern Europe, a far larger percentage of Americans had begun to state in polls that economic problems, not Soviet military power, posed the greatest threat to America's future.

The foreign-investment phobia

The obsession with Japanese economic domination, which reached a fever pitch in the early and mid-1980s, overlaps considerably with the increased sense of dependence that marks America in the late 1980s. But there are differences as well. Our image of international competition is of two runners in a race. But the image involved in psychological dependence is different; one thinks of a master and a supplicant, who are not even presumptively equal enough to participate in the same race.

Our transition from the first image to the second came with the realization of the extent to which the American budget deficit was being funded by Japanese purchases of American government bonds. These purchases are encouraged, of course, by the American trade deficit with Japan—a result of United States-Japan economic competition. But the purchase of bonds changes the metaphor of the relationship from race to supplication; it is suggested that we now depend on the good will of foreigners to maintain our unbalanced budget. When foreigners purchase American companies on American land, the suggestion is that we are similarly being placed in a dependent position. To use a metaphor that has appeared in American political debate, we have become "renters" rather than "owners."

In 1988 the first significant book ever published on foreign investment in the United States attracted attention for its glum view of an America losing its proud independence. Martin and Susan Tolchin's *Buying Into America: How Foreign Money is Changing the Face of Our Nation* labors long and hard to make the reader conclude that foreign investment is not only significant but worrisome. Like *The American Challenge*, the book is full of scary metaphors. "Once they own your assets, they own you," the Tolchins state on the first page of their book, quoting Senator Frank Murkowski of Alaska. They write: "As American multinationals threw themselves into foreign politics to protect their investments, as in the days when ITT overturned the government of Chile and United Fruit ran Guatemala, foreign multinationals are doing the same to

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America." The authors find that in its shift from net lender to net borrower, the U.S. bears "an eerie resemblance to Latin America"; they paint a picture of the American people subject "to the will of foreign bankers, who set their priorities and decide what they can buy and how much they can spend." One of their chapters, in fact, is titled "Brazil North."

Still, their discussion of the economic ill effects of foreign investment—except perhaps for their concern that foreign debt holders might suddenly call in their loans and provoke a national crisis—seems to grasp at straws. Instead, as with Servan-Schreiber, the Tolchins' real concern is the loss of political and cultural independence. They fear that domestic companies now owned by foreigners may establish political action committees that contribute to American political candidates, despite the prohibition against contributions by foreigners to American campaigns; the authors approvingly quote Senator Lloyd Bentsen's fear that this possibility "open[s] the door to foreign influence in our elections." They also speak ominously of "media penetration" by foreigners, and they note that "the ease with which foreign investors purchase American newspapers is unique," since "most countries recognize the importance of the media to their national well-being and restrict their ownership to their own citizens." These fears seem to be the chief impetus for the Tolchins' criticism of the competition among the American states to provide tax benefits and other inducements to foreign investment. (In this respect, *Buying Into America* resembles *The American Challenge*, in which Servan-Schreiber criticized European "collaborators" who offered similar inducements to prospective American investors.) "The states now lead the nation in shaping foreign investment policy," the Tolchins write unhappily, "unimpeded ... by the federal government."

The Tolchins' book as a whole, however, is strangely tentative. Often it approaches alarmed, even apocalyptic, conclusions about a foreign invasion and the loss of national sovereignty. But it usually qualifies such conclusions with a series of "on-the-other-hand"s. It even includes two chapters on how foreign owners did better than previous American owners in running two American plants. The final chapter, which discusses strategies for dealing with foreign investment, reaches the distinctly unapocalyptic conclusion that "although the United States has entered the global economy, where all nations sacrifice a measure of independence, America seems to have gone overboard."

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The political-influence anxiety

Along with the increased attention to the growing foreign presence in American industry have come the beginnings of attention to foreign involvement in the American political system, and particularly to the kinds of involvement that the Tolchins took up in their book. Both the *National Journal* and *Business Week* have run stories on the growing lobbies maintained by foreign companies, and on state efforts to attract foreign investment. The first *National Journal* story on the topic (entitled "Japan Trying to Buy Washington Or Just Do Business Capital Style?") appeared in 1982. The basic problem for foreign lobbyists, the article noted, is "that foreign firms aren't constituents of any Member of Congress." It stressed the information-gathering role these lobbyists undertook for their clients and only hinted that foreigners were beginning to try to mobilize constituents. But the next year—when heavy lobbying was helping to defeat the protectionist "domestic content" automobile legislation introduced in Congress—*Business Week* noted the changes in lobbying techniques in an article entitled "The Powerful Lobby That Works for Japan in Washington." The forces opposed to the domestic-content legislation were bringing five thousand auto-import dealers to Washington; *Business Week* quoted a spokesman as noting that "we have something to say, and with at least one of our dealerships in most congressional districts, they're going to have to listen to us."

These later articles also point to a backlash against foreign involvement in the American political process. One of the lobbyists mentioned in the 1983 *Business Week* article confessed, "I try to tell them that I represent 35,000 U.S. citizens, and they look at me like I'm dirt." A 1986 *National Journal* article on lobbying by developing countries noted the introduction of a bill into Congress that would have prohibited Cabinet members, White House staff, and most presidential appointees (but not members of Congress) from lobbying for foreign entities for a full ten years after they had left government employment. And in late 1987 the *National Journal* ran an article—titled "Risky Representation"—that focused on the growing criticism of Americans who lobby on behalf of foreigners. "There is often an emotional charge," the article stated, "attached to the representation of a foreign client. That emotional intensity is heightened when the client's objectives are not purely economic in nature but extend to the political and national security arenas as well."

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A similar heightened sensitivity now marks articles on state and local recruitment of foreign investment. The *National Journal* and *Business Week* each ran descriptive stories on such efforts in the mid-1980s. But a *National Journal* article in early 1988 on the same subject had a more worrisome tone, referring to states that had established "embassies" abroad (the article put the word in quotation marks, but its very use suggested that the quest for foreign lucre was giving rise to vaguely un-American behavior) and noting that the states "are treading what one governor calls a 'fine line' between representing their own interests and entering the foreign policy arena."

The economic, political, and indeed the broader cultural worries all came together in the summer of 1988, in a fascinating *Business Week* cover story called "Japan's Influence in America." The cover illustration featured an American eagle coyly hiding itself behind a Japanese fan. The article discussed Japanese funding of thirteen professorships at MIT, a Japanese-funded children's-television production of a Sesame Street adventure called "Big Bird in Japan," and the resignation of the head of a Japanese-supported think tank in the U.S. who quit after protesting efforts by Japanese sponsors to influence the organization's research. All this, the article concluded, "will test the character and integrity of America's institutions far more than any wave of imports ever did."

Should we worry?

What difference, finally, does all this internationalization make? My own view is that what overwhelmingly drives America's newfound status as internationalized rather than simply internationalizer is neither America's weakness (as the pessimists argue) nor its attractiveness (as the optimists maintain). It has less to do with us at all than with the foreigners who are doing the internationalizing. A number of strong economic cultures have now emerged, and people from those cultures want to mix their special skills and resources with those available in the United States. The internationalization of America mainly reflects the unsurprising fact that actions that only American firms could easily undertake twenty years ago can now be performed by foreign companies as well.

It is necessary to examine carefully each facet of the growing internationalization of America, to see whether (as is commonly asserted) it affects the policymaking ability of the national state.

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Does foreign purchase of American government bonds, to take a current example, make us especially dependent on foreigners, since they might unload their purchases at any time? Not necessarily. The United States allows free capital outflows as well as free inflows, and the same things that might make foreigners wary of holding American paper would presumably also apply to sophisticated American purchasers. If there were concern, say, that the dollar might fall, not only foreigners might withdraw funds from the United States; Americans too might choose to buy yen-denominated financial instruments to benefit from the yen's gains. It is indeed difficult to use interest rates to stabilize an economy that permits capital to flow freely, because changes in interest rates affect capital movements and hence alter exchange rates and trade flows. But this difficulty has little to do with the distinction between foreigners and Americans, since both groups would respond similarly to interest-rate changes.

Does the internationalization of business make it more difficult to develop, say, national environmental or welfare-state policies, for fear that such policies raise costs and hence would drive capital away from one's own country? Not really. Environmental or welfare-state legislation can have real costs, as well as real benefits. But even if one closed one's country to foreign trade or to capital outflows, one would not eliminate those costs. One would simply pay them in the form of higher prices for domestically produced goods. Opening the borders does not make environmental or welfare-state legislation any more costly. If the country is to compete against cheaper foreign-produced goods, real cash wages must decline somewhat, but at the same time consumer prices are kept lower than they would otherwise be. The costs of the two policies are identical; the difference is that in one case they appear through a higher cost of living and in the other through lower wages.

Finally, the influence of foreigners on domestic political processes is a cause of concern for some. But if all firms in the United States were foreign-owned, business would certainly have less political power than it does now, since domestically owned firms are both more inclined and better positioned to influence domestic politics.

In the final analysis, the most interesting issues raised by the internationalization of America and the growing sense of dependence that it has produced are cultural. It is hard to miss the

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plaintive "am I master in my own house?" tone of the American manager, quoted in the *Business Week* cover story on Japan in America, who notes that "when you're sitting in a meeting, and it begins to get interesting, they suddenly start speaking Japanese only." Neither the economic nor the political worries raised by the foreign presence make much sense except in the context of the cultural differences between foreigners and Americans. The fearful reactions to the foreign presence suggest that, internationalization notwithstanding, the national state remains not only a relevant policymaker but also a relevant focus of attention.

One may welcome Americans' cultural fears as the assertion of deeply felt and positive traditions against the pressure of a bland homogenization, or one may deplore them as narrow-minded chauvinism tinged with racism. In either case, the new foreign presence invites, indeed demands, a political debate about how we wish to influence the content of our culture. My own view is that we should not seek to restrict the internationalization of America in the name of preserving a distinctly American national culture. The cultural result of internationalization is far less likely to be a bland homogeneous "international" culture than a variegated tableau of many national cultures. The relative equality that characterizes the interaction of cultures in a more international America may provide the best opportunity we have ever had to learn from different cultures; our previous exposure to other cultures has come largely from downtrodden immigrants whose search for economic opportunity or political safety led them to America but did not instantly put them on an equal psychological footing with us. We must complete the transition from a period in which Americans tended to consider our culture as better than the cultures of other nations to one in which we accept that we have things to learn as well as to teach. The end result will be the enrichment of lives as well as livelihoods. But managing the transition will be difficult. The debate over culture is crucial to the debate over America's internationalization; if that debate is to be resolved constructively, we must think explicitly about how to conduct it.

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The myth of the general right to bail

ROBERT F. NAGEL

MACHINE-GUN FIRE on city streets in broad daylight, pushers arrested in schoolyard playgrounds, commando operations against drug lords in South American jungles—such are the images that in recent years have frightened the public and galvanized it to declare a war on drugs. Proposals for coping with drug-related crimes range from executing "kingpins" to banning beepers from public schools. Legislation enacted in 1988 provides more federal money for drug treatment and education, and denies certain benefits (including public housing) to drug felons. Former Mayor Koch called for using the military to arrest drug offenders and for incarcerating them in tents in the Nevada desert. Others urge legalization of narcotic use. The nation now has a drug "czar," who has proposed an elaborate national strategy that includes expanding drug-testing programs, sending offenders to boot camps, and publicizing the names of first-time users.

As serious as the spread of drug-related crime is, the alarm and dismay that it has precipitated are connected to even deeper reservoirs of fear. The prevalence of illegal drug use and its associated

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street crime raises doubts about the capacity of government to maintain minimal order. This underlying anxiety over the precariousness of civil life may seem paranoid in a stable, wealthy democracy. But short confrontations with anarchy are realistic threats for everyone. The possibility of sudden violence has always been with us, especially for the elderly, the urban poor, and women. The drug crisis has intensified and spread the fears that have long been felt by these vulnerable groups. It has engendered a broad array of policy proposals because it has given all groups a sharper sense of the possibility of violent disorder and civil breakdown.

Despite our concern about violence, however, we continue to allow those who have been arrested for serious crimes to return to society on bail. Sometimes we even release felons convicted of violent offenses pending the completion of their appeals. Already injured and frightened by what cannot be controlled, why do we release suspects who have been identified, captured, and safely detained?

The answer is not that those awaiting trial or appeal are harmless. As one would expect, there are many reported instances of bailed suspects repeating the crime for which they had been arrested. In one California case, for instance, a man posted bond after being arrested for two murders; he then murdered a seventeen-year-old, only to be released on bail *again*. Rearrest rates for bailees have been found to be as high as 35 percent, and in one study almost 30 percent of those rearrested were arrested two or more times while on bail. Such findings are only suggestive because arrests do not always lead to convictions and because crimes do not always result in arrests. Statistical studies of "bail crime," moreover, yield varying results and are the subject of considerable debate. But it is surely not necessary to wait for definitive numbers before concluding that a significant portion of those charged with violent crimes are dangerous. This common-sense view has shaped bail laws throughout Western Europe, Australia, and elsewhere. In the United States it influenced the federal Bail Reform Act of 1984, which provides for preventive detention when there is convincing evidence that the arrestee is dangerous, and it is implicit in the common (though illicit) American practice of setting prohibitively high bail for serious crimes.

Still, in this country we often turn suspects loose despite strong evidence that they have sold narcotics, burgled, robbed, shot,

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maimed, or raped. Even under the federal preventive-detention law, only 17 percent of drug defendants are denied bail under the "dangerousness" provisions; 68 percent are released. While we cannot eliminate crime completely, we can take the obvious and direct step of denying bail for serious felonies. The reason that we do not is a textbook illustration of the way in which extravagant claims about constitutional rights work themselves into our thinking, eventually converting costly, even bizarre, policies into unassailable moral imperatives.

Inflated rhetoric

The language used even in informed discourse about the Constitution betrays how strong is the appeal of certainty and simplicity. Through the years, academic commentary on the right to bail has often referred to "our absolute right to bail" in noncapital cases. Supreme Court justices have intoned that without an "unequivocal" right to freedom before conviction, "the presumption of innocence, secured only after centuries of struggle, would lose its meaning." In bemoaning the preventive-detention provisions of the 1984 Bail Reform Act, the *New York Times* editorialized that "America's very sense of justice turns on the noble presumption of innocence."

Carried along by such heady rhetoric, a conscientious citizen might conclude that the Constitution requires the government to treat people who have been seen committing vicious crimes as if they were innocent. Presumably even violent felons are entitled to walk out of jail after arrest, at least if they can show that they have appeared punctually when tried for their previous crimes. If such an inference seems too strange to warrant serious attention, consider the words of Harvard Law School's Laurence Tribe:

> [The presumption of innocence] represents a commitment to the proposition that a man who stands accused of crime is no less entitled than his accuser to freedom and respect as an innocent member of the community. Only those deprivations necessary to assure the progress of the proceedings against him ... may be squared with this basic postulate of dignity and equality.

Elevated and simplistic rhetoric of this kind comes naturally to the elites who are immersed in constitutional law, in part because their subject matter is supposed to represent our fundamental, abiding political morality. Those who write about our deepest values can be expected to indulge some inspirational and exaggerated

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notions. The Constitution, however, is neither absolute nor clear on the issue of pretrial release; rhetoric about "the presumption of innocence" is not true to the limited and ambiguous values that are actually part of our fundamental charter.

The Fifth and Fourteenth Amendments provide, not that those arrested must be presumed innocent, but that government may not deprive any person of liberty "without due process of law." To require that legal process be followed is not at all the same as to specify that only a full criminal trial can justify detaining those accused of crimes. Indeed, we know the Framers did not mean the latter because their practice was to deprive the accused of at least some liberty after those limited procedures incident to lawful arrest.

Similarly, the Eighth Amendment provides, not that there is a right to bail, but that "excessive" bail shall not be required. To demand that judges set reasonable bail where legislatures have indicated that bail is appropriate is not at all the same as to require that legislatures authorize bail for all offenses. Indeed, we know the Framers did not mean the latter because their practice was to deny bail in capital cases. In the face of a long English and colonial history of statutory specification of the offenses for which bail was available, the Framers addressed the Eighth Amendment primarily to judges. The Framers did not require that "bail shall be admitted," although they certainly knew how to use such language; not only did the Judiciary Act of 1789, which was enacted by the same Congress that proposed the Bill of Rights, make this provision with respect to noncapital crimes, but other constitutional rights—for example, that "the accused shall enjoy the right to a speedy and public trial"—were plainly worded to create substantive protections. Against all this evidence, many constitutional scholars have nevertheless concluded that the Framers intended to create a right to bail. The main reason for ascribing this astonishing intention to the Framers is Professor Caleb Foote's suggestion that George Mason (who drafted the language of the bail clause) did not know what he was doing because he was not a lawyer.

Bail and legal traditions

Perhaps recognizing that attributing important constitutional meaning to a drafting mistake is a bit weak, much of the bail commentary also relies on assertions about "our" traditions and practices. Thus Daniel Freed and Patricia Wald write in their in-

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fluential *Bail in the United States* that "bail in America has developed for a single lawful purpose: to release the accused with assurance he will return at trial." According to Tribe, "we have traditionally detained individuals likely to flee or otherwise avoid prosecution," and indeed "we have accepted some risk of crime as the inevitable price of a system that promises to punish no man until it is shown beyond a reasonable doubt that he has committed a specific illegal act."

These descriptions of what "we" have done are no more accurate than the farfetched arguments about what our forefathers supposedly did. It is true, as most writings emphasize, that ever since the Judiciary Act of 1789 there has been a federal statutory right to bail in noncapital cases, and that a long history of colonial laws provided for bail "unless for capital offenses, where the proof is evident, or the presumption great." As Albert Alschuler has demonstrated, this legal tradition extends both backward and forward in time. It extends back to thirteenth-century England, where statutes created a right to bail if the punishment did not involve loss of "life or member" or if there was only "light suspicion." It extends forward to the constitutions of some forty states, where bail is provided for except in capital cases where "the proof is evident."

But this impressively long history gives little support to a general right to bail. In thirteenth-century England, bail could be denied for robbery, rape, burglary, manslaughter, and other felonies if the defendant was caught in the act. During the American colonial period, bail could be denied in capital cases, which included such crimes as murder, idolatry, witchcraft, bestiality, adultery, rape, treason, arson, and burglary. At the time that the Eighth Amendment and the Judiciary Act of 1789 were being framed, most serious felonies were capital offenses. It was well into the nineteenth century before the federal government reduced the dozens of crimes punishable by death to a few that included murder, treason, and rape. In this century, states dropped and added crimes to the list of capital offenses in response to public mood; at one time or another, train wrecking, kidnapping, armed robbery, espionage, rape, arson, treason, and providing narcotics to minors have each been punishable by death.

In short, for almost all of our history both the federal government and state governments made the death penalty available for those crimes thought to be especially heinous or threatening. A secondary effect of classifying a crime as "capital" was to permit

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the denial of bail for that offense. "We" have long followed the sensible path of using legislation to reflect the public's sense of repugnance to particular crimes, at once determining the severity of the punishment and allowing for an adequate sense of community safety.

But imposition of the death penalty can no longer be used as a shorthand method for making decisions about the availability of bail. In recent years the Supreme Court has declared capital punishment to be unconstitutional "cruel and unusual punishment" when imposed for offenses—like rape—that do not involve murder, and it has greatly restricted the availability of capital punishment even in murder cases. Moreover, attitudes on the morality of the death penalty have changed since the framing of our Constitution, and some states do not permit capital punishment even for first-degree murder. Despite the fact that these decisions are not directly relevant either legally or morally to the issue of pretrial detention, their consequence has been to make a range of reprehensible and dangerous crimes not only exempt from the death penalty but also bailable.

The decision to link capital punishment and the denial of bail, however, was always a matter of federal statute and state law. Now that the Court has strictly limited the availability of the death penalty, Congress and the states can exercise the discretion that the drafters of the Constitution wisely left them. They can decide whether the availability of bail should be determined on a different basis than the availability of the death penalty.

Already there are some legislative initiatives that permit or require the denial of bail for certain noncapital crimes. The District of Columbia Council recently approved emergency rules permitting pretrial detention for crimes involving firearms and drugs, and Senators Brock Adams and Phil Gramm have suggested a parallel congressional enactment. Michigan has classified serious sexual offenses and certain other violent crimes as nonbailable. Nebraska similarly classifies first-degree sexual assault, and several jurisdictions limit bail for multiple offenders. As Alschuler has pointed out, these state laws continue the legal tradition dating back to the thirteenth century of permitting the denial of bail for serious crimes, if the proof is "evident or the presumption great."

So far, however, the reassertion of traditional decisionmaking prerogatives on bail has been *ad hoc* and scattered. One reason is the influence over public opinion of the "presumption of inno-

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cence" mythology. The elite groups that propagate this exaggerated and simplistic mythology are clinging to a position that no ordinarily sensible person (let alone the rigorously realistic Framers of our Constitution) would take seriously. The influence of these groups has helped to keep us from coming to grips with the tragic consequences and dilemmas associated with pretrial release.

One-way compassion

Constitutional opinion-leaders tend to focus their concern on those against whom the government is acting. Our actual Constitution, of course, was designed not only to protect individuals from government power but also to authorize the collective use of power to insure, among other things, domestic tranquillity. Everyone knows this, but those immersed in constitutional law are inclined to emphasize what courts normally concern themselves with—the adjudication of claims about rights. Thus the great bulk of influential writing about bail has centered on the various injustices that can surround the denial of bail: the racial and economic discrimination that can be involved in setting high bail, the availability of alternate mechanisms to assure appearance at trial, the difficulty of predicting dangerousness, and so on. These are all serious problems, but for the most part the literature emphasizes the costs to individuals of denying bail to such an extent that it ignores or minimizes the costs to society of granting bail.

Again, Professor Tribe illustrates the deficiency. Writing in 1970, he described the offenses committed by persons awaiting trial as "only a small component of the total crime problem." Indeed, "only 5.9% of all persons indicted in the United States District Court for the District of Columbia in 1968 allegedly committed an offense while on bail." He described another study as showing that "less than 9.2%" of those released were charged with new offenses, and in yet another study "only 4.5%" were arrested for violent crimes. Masked by all those "only"s is the reality of suffering and fear felt by the victims unlucky enough to be asserting a simple need for governmental protection rather than a constitutional right against government. If there is any doubt about how far one-sided attention to rights can drive sophisticated constitutionalists, Tribe resolves it: "Indeed, it is difficult to imagine any governmental interest unrelated to the integrity of pending proceedings that might justify singling out for special disabilities those persons charged with crime."

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Such hyperconcern for rights not only obscures the importance of social interests, but also magnifies the harms that might result from limiting rights. When the *New York Times* editorialized against the preventive-detention reforms of 1984, it acknowledged that some pretrial detainees present a threat of violence to the public, but concluded: "The sharper danger is that tomorrow's prosecutor will find it easier to 'regulate' other defendants who harbor unpopular ideas." While there are real problems with preventive detention, surely it is strained to paint the immediate threat of violence by accused criminals as less real than the remote possibility that the government will misuse pretrial detention to trample freedom of speech. Nonetheless, in making dire predictions about the consequences of restricting bail, the *Times* was just echoing constitutional experts. Justice Jackson (quoted with approval by Freed and Wald) wrote that "imprisonment to protect society from predicted ... offenses is ... fraught with danger of excesses and injustice...." And Tribe, concerned that continuing pressure to broaden preventive detention is "inevitable," has concluded ominously: "What begins as an ounce of detention ... may well become the first step of a profound shift in our system of criminal justice." In the topsy-turvy world of what is called "constitutional" law, real dangers and immediate injuries that could be prevented by collective action are unimportant, while hypothetical and often fanciful fears about future violations of rights have grave significance.

In normal discourse, anyone asserting this peculiar combination of positions would bear a strong burden of persuasion. Ordinary reactions and common-sense beliefs can, of course, be wrong, but usually those asserting strongly counterintuitive claims shoulder a responsibility of justification. The elites who expound the Constitution, however, do not rely on their own authority; they purport to be reaffirming basic decisions already made, extraordinary wisdom already applied. Indeed, the mythic status of the Constitution is actually consistent with decisions that seem unwise and beyond common understanding. The essential idea of constitutional rights, says the legal philosopher Ronald Dworkin, is "that an individual is entitled to protection ... even at the cost of the general interest." Under this view, to persist stoically in guarding rights in ways that have unfortunate consequences is actually one sign that the rights being vindicated are "constitutional."

It is always possible that original constitutional understandings or our deep political traditions require the protection of particular

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rights that have turned out to be unwise and socially harmful. But it is fairly clear that the right to bail does not fall into this category. Nevertheless, realistic bail reform is as precarious as it is limited. Not only do many conscientious decisionmakers assume that it would be somehow un-American to deny bail in noncapital cases, but the habits of thought that underlie bail mythology find their purest expression in judicial interpretations. It is distinctly possible that the Supreme Court might invalidate some of the sensible bail reforms that have arisen so hesitantly from the ashes of the Court's death-penalty case law. It is important, therefore, to ask whether our real Constitution—the Constitution of the Founding Fathers and of our sustained political traditions—can be vindicated in the courts, where too often common sense is the first casualty.

Prospects in the courts

"Sophisticated" thinking about the right to bail has not given expression to our underlying constitutional agreements, but rather has diverted attention from solid evidence about the nature and extent of those agreements. This diversion is not necessarily cynical or dishonest; it is primarily the result of earnest efforts to cope with facts that contradict the overwrought moralistic claims that are the starting place for so much of the discourse on the Constitution. As the Court's record in such areas as free speech, equal protection, and due process fully demonstrates, our jurists can be as subject as the rest of us to the allure of uncomplicated moralism.

Judges, moreover, have a special temptation to simplify the complex constitutional values relating to bail because they have the very real difficulty of applying a contradictory set of principles in concrete circumstances. Consider the problem that the courts face: We have a long legal tradition of permitting the denial of bail where there is compelling evidence of a serious crime, and this practice is consistent with the limited constitutional protection against "excessive bail" in the Eighth Amendment. We also have a strong tradition of allowing punishment only after the procedural protections afforded in a trial, and this tradition is manifest in the due-process clauses of the Fifth and Fourteenth Amendments. How can a principle that permits pretrial detention be squared with the principle of due process? Although it would surely be an enticing solution, a serious judge cannot ignore either principle. A mature understanding of the Constitution requires coming to terms with its limitations and inconsistencies. The best that courts can do

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is to try to accommodate the conflicting standards that coexist in our fundamental law.

The Supreme Court has tried to do just this by insisting that pretrial detention is not "punishment" if its objective is "regulatory" rather than "punitive." If the purpose behind incarceration is moral condemnation and punishment, the detention is considered punitive. But if the motive is to protect society (for example, from predicted criminal acts), the purpose is said to be regulatory. It was on the basis of this distinction that the Court upheld federal preventive-detention provisions in the 1987 case of *United States* v. *Salerno*.

The virtue of this distinction is that it permits symbolic affirmation of both constitutional principles. The distinction, however, is not realistic; "punishment" and "regulation" simply are not separate categories. The Court's distinction is cold comfort to the untried defendant who sits behind bars in a county jail, for the effect of incarceration is to punish no matter what the purpose may be. A civilized society, moreover, would not protect itself from a defendant's predicted behavior ("regulate") unless it also condemned what the defendant was thought to have done already. Preventive detention, viewed realistically, is therefore not purely regulatory. Nor are criminal sentences purely punitive; their traditional purposes include deterrence and rehabilitation, both of which are regulatory objectives in the sense that they forestall anticipated harms to society. Civilized societies normally do not act for solely punitive purposes any more than they act for solely regulatory ones.

There are sound reasons for basing pretrial detention on the seriousness of the crime and on the substantiality of the evidence, rather than on predictions about future conduct. The problem with preventive detention is that it requires an open-ended, potentially difficult hearing about something that need not be an issue. What ought to matter is the strength of the evidence that the suspect has committed a serious crime, not speculations about what the suspect might do in the future. After all, if the proof is clear that a heinous crime has been committed, dangerousness need not be predicted. It has been demonstrated.

The Supreme Court, however, may see in such a system too much moral condemnation and not enough regulation. As forthright analysts like Mickey Kaus have noted, the truth is that a useful system of pretrial detention would be broadly "punitive." Like the historic practice of detaining those accused of capital of-

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fenses, a sensible list of offenses eligible for pretrial detention would be inextricably tied to moral repugnance at the seriousness of the crimes. Pretrial detention, moreover, would serve other purposes of criminal punishment besides condemnation. By making incarceration (if only for a relatively short term) more certain, it would act as a powerful deterrent, especially for those in the criminal culture whose time perspective is too short to be influenced by remote and contingent punishment after trial.

Nonetheless, other "regulatory" programs, including preventive detention, inevitably act as deterrents as well. The fact that policymakers recognize how pretrial detention can serve many of the same purposes as criminal punishment ought not to serve as a basis for invalidating pretrial detention. It is realistic, not invidious, to see the necessary overlap between punishment and regulation.

While a pretrial detention system would be partly punitive, it would also be regulatory in important respects. Behind any system of legitimate laws lies the public's sense that the coercive power of government will be used in serious and reliable ways. To arrest someone for a violent crime, to possess solid and convincing evidence of that person's guilt, and then to release him is to undermine the implicit pact between government and citizen. It is to diminish the importance of what has happened to the victim and what could happen to others. It makes the criminal-justice system seem frivolous, an arena for a game rather than for a morally significant enterprise. The victim of a rape or burglary who sees the bailed suspect out on the street is harmed even if the suspect does not repeat his crime. The victim need not feel any need for vengeance (although such a need will certainly be felt) to have a justifiable sense of outrage and betrayal. The victim's claim—and by extension the claims of those who sympathize and identify with the victim—is not purely punitive, and it is more than a demand for protection. It is a demand that government take what happened seriously, that the law deserve the respect that it demands. The release of suspects against whom there is strong proof of a significant crime is, for society, a self-inflicted wound. It undermines the social compact and aggravates deep fears of social disintegration. In preventing this injury, pretrial detention would serve some of the most fundamental regulatory purposes.

Would the Court accept such interests as being both "regulatory" and sufficiently important to justify pretrial detention? The *Salerno* decision does not foreclose this possibility but suggests some

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impediments. The purpose of the Bail Reform Act of 1984 was to prevent "danger to the community." The Court noted that under the Act the government must provide "convincing proof that the arrestee, already indicted ... for a serious crime, presents a demonstrable danger to the community." It concluded that "under these narrow circumstances, society's interest in crime prevention is at its greatest." The governmental interests promoted by classifying some crimes as nonbailable would not be so concrete. Although the objectives would include preventing the repetition of especially frightening and harmful crimes, this would not be tied to individualized determinations of dangerousness. More importantly, the government's interest would not be limited to crime prevention; its interests would extend to the more generalized purpose of communicating respect and concern for alleged victims and potential victims, thereby promoting the legitimacy of the criminal-justice system itself. No court could question the importance of such objectives. But in many areas of constitutional law, the judiciary displays a reflexive preference for purposes that are specific and tangible. (Recall, for example, the Court's recent dismissive treatment of the social interests behind flag-desecration laws.) *Salerno* is at least consistent with the judicial bias against diffuse public purposes.

The Court may believe there is a special reason for rejecting broad government interests as justifications for restricting bail. In *Salerno*, the justices said: "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." Accordingly, they emphasized that the preventive-detention statute not only carefully itemizes those few crimes dangerous enough to warrant holding the suspect but also requires a finding that "no condition of release" can dispel the danger. In contrast, it might be thought that regard for victims and governmental legitimacy would be such general justifications as to permit pretrial detention to become the norm.

It would be a partial answer to this objection to define very carefully those crimes that are to be nonbailable. The stronger the indications that the selected crimes are in fact tied to physical danger and public fear, the more credible the claim that bail is still available except where special justifications exist for denial. Nevertheless, there is a difference between case-by-case and categorical determinations. On this point, the exaggerations of constitutional rhetoric must be met head on. The fact is that under our

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written Constitution and our political traditions, the question of how exceptional the denial of bail should be is, in the first instance, the province of the legislatures. Before, during, and after the framing of the Constitution, the political branches had discretion to respond to the public's sense of outrage by classifying crimes as capital and thus authorizing the denial of bail. At times this meant that many serious crimes were nonbailable, and at other times it meant that few were. Grand claims about how the availability of bail is normal should not be permitted to obscure the real discretion traditionally allowed our legislatures to categorize crimes as nonbailable.

This legislative authority has been constrained by one crucial limitation that, oddly, is missing from the preventive-detention statute that the Court has already approved. Not only the Judiciary Act of 1789 but virtually all state enactments have required an individualized determination that the proof is "evident, or the presumption great." This requirement echoes the ancient English practice of limiting bail denial to circumstances where the accused was caught red-handed. The Bail Reform Act of 1984 contains no such heightened demand for proof of guilt. In this important respect, categorical pretrial detention would be more exceptional than the limits on bail that the Court validated in *Salerno*—and far more in keeping with the sustained consensus that our Constitution is supposed to represent.

Pretrial detention represents a grievous loss of liberty for the defendant. Nevertheless, it is not inconsistent with the core of the principle of due process. The full force of the law's punishment still would not be inflicted until after a fair trial. And the harm to the suspect would not be inflicted without an adequate hearing that established clear and convincing proof that the suspect committed a serious, dangerous crime. This is not perfect due process of law, and it is full of risks. Some innocent people will be incarcerated. But there is risk under the present system, where judges often either pretend bond is appropriate but purposely set it too high or base their decisions on predictions rather than on fact-finding.

Mythical thinking about constitutional "rights" should not prevent us from recognizing the risks that arise from releasing suspects as a matter of course or when proof of future dangerousness is impractical. Those suspects do commit new crimes and their presence in the community does frighten people and devalue the legal system. The Constitution, read as a complex and contra-

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dictory document, could not and does not require perfect procedural protection before incarceration. As the movement to enact pretrial-detention statutes spreads, elite commentators and jurists should recognize that popular grievances are justified. The Constitution that we would have under a system of pretrial detention for noncapital crimes would be fairly close to the one we have always had. It might seem somewhat less perfect than the idealized and simplified "constitution" that so beguiles and distorts our discourse. But the Constitution that is based on our collective good sense is both morally balanced and politically secure.

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Robert Bork and the crime of inequality

AARON WILDAVSKY

WHEREAS other failed nominations to the Supreme Court have sunk from public view, the debate over Judge Robert Bork gains in intensity as if the state of the nation, and not merely the fate of an individual jurist, is at issue. Far from settling the matter, the Senate's rejection of President Reagan's first choice for the seat vacated by Lewis Powell has spurred renewed efforts both to justify and to condemn what was done.

The case of *Bork* v. *Senate* reflects our struggle over the meaning of America: will these United States continue to be exceptional in believing that liberty and equality are compatible, or will the American people join the people of other Western nations in the ideological wars that pit equality of opportunity against equality of condition? Are we witnessing the end of American exceptionalism—with race, gender, and economic class coming to be seen as fundamental objects of division—or will we, the people, reaffirm our original convictions?

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Whose mainstream?

In recent decades it had been customary for the Senate to approve the President's choices for the Supreme Court as long as they were qualified and of good character. It had also been customary not to inquire closely into nominees' views on constitutional interpretation, so as not to give any appearance of prejudice in cases that might come before the Court; Senator Edward Kennedy, for instance, used this rationale in defending the appointment of Thurgood Marshall. Such customs, however, require the political parties to be sufficiently close together that expertise matters more than ideology. The first thing that we learn from the Bork episode, therefore, is that consensus has been replaced by division; the two sides are too far apart to accept either presidential prerogative or neutral competence as a criterion for making decisions. Bork was attacked not on grounds of knowledge, where his opponents could hardly have bested him, nor on grounds of personal integrity, but on grounds of policy. Not he but his ideas were attacked as indecent.

One could hardly blame the senators had they simply done what comes naturally to them and voted their policy preferences. But the rhetorical stakes were much higher in the battle over Bork. Bork's philosophy was labeled not just undesirable, but immoral. The passion of these attacks reflected the unwillingness of Bork's antagonists to permit their egalitarian dogma to be questioned. Debate over equality was ruled illegitimate.

Consider, for example, the charge that Judge Bork was somehow "outside the mainstream" of judicial thought. Its preposterous quality was part of its charm: How could a superb legal craftsman be outside the mainstream when he was one of the leaders in determining what constituted excellence in legal reasoning? How could a judge who had written some 150 opinions, and had never been reversed by a higher court, be outside the mainstream? Why weren't America's political institutions, which Bork had devoted his life to protecting, in the mainstream that his opponents were accusing him of polluting?

Precisely because the charge of extremism was so unfounded, Judge Bork did not at first take it seriously. When he did, he discovered that the beauty of absurd charges is that the person who responds to them is made to look sillier still. For Bork to try to prove that he was not outside the mainstream is like your trying to

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explain that you're not really a vampire: even repeating the allegation lends it more credence than it deserves.

If Bork was truly an extremist, after all, there was no reason to fear him. His weapon was the pen, not the sword. How could a self-evident extremist persuade a single justice of the Supreme Court, let alone enough to constitute a majority, to adopt views at once far out, destructive, and rejected by a large majority of the citizenry? No, the fear of Bork was grounded in the much more accurate perception that he would persuade his colleagues to uphold legislative majorities and the views of the Framers against those who would substitute their own values. Bork's opponents thought that he alone among contemporary conservatives was capable not only of crafting a coherent doctrine of constitutional interpretation but of convincing others—his fellow justices, legal scholars, the political stratum—of the need to alter gradually but decisively the pattern of decisions. As Bruce Ackerman observed, Bork was the one possible nominee who had "the transformative vision and the legal ability needed to spearhead a radical judicial break with the past."

"Mainstream," as the term was used against Judge Bork, was a code word for supporting equality of condition. Bork was being accused of fostering inequality. When one disentangles the charges against him, they are all variations on this theme: anti-woman, anti-black, anti-"gay," anti-poor. Listen to the testimony of those who spoke against him:

- Professor Burke Marshall: "adamantly opposed to protecting ... disadvantaged and unpopular minority groups."
- Professor Philip Kurland: "directed to a diminution of minority and individual rights."
- Lawyer Vilma Martinez: "would provide less equal protection to racial minorities and to women than they currently enjoy."
- William T. Coleman, former chair of the NAACP Legal Defense Fund: "would turn back ... removing the vestiges of slavery, of 350 years of legally enforced racial discrimination, and of centuries of irrational discrimination against women."
- National Coalition for Women and Girls in Education: "devastating impact on individual rights.... [U]nprecedented hostility to ... individual rights.... Judge Bork would enable employers to dictate the parameter of female employees' 'reproductive freedoms.'"

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- National Conference of Black Lawyers: "pernicious to everyone but those who comprise the majority."
- National Council of Churches of Christ: "It is victimized individuals, minorities, and the unrecognized public good that need the protection of the courts ... that Bork's conception of 'judicial restraint' would deny them.... [Bork would] shield the powerful against the weak."

In his defense, Bork claimed that his private views are not necessarily the same as his interpretations of the law; however he might personally feel about these matters, his duty as a judge forbade him from finding that women or homosexuals or chiropodists have rights that are neither mentioned in the Constitution nor known to those who wrote, debated, and passed the provisions in question. But Bork's opponents denied any difference between the personal and the political: judges who refuse to recognize a right because it is not stated in the law are no different than those who personally reject (and personally desire to reject) the right. Just as a dietitian might say that "you are what you eat," so Bork's adversaries equated intention (upholding the law) and outcome (denying a right): in their view, you are what they think you cause. To be a "racist," in this lexicon, one need not be racially prejudiced; it is enough if one's words and deeds tend to bring about results adverse to blacks. In the meaning of the 1930s expression, Bork had become "objectively" inegalitarian.

If Bork replied that he was trying to follow the original understanding of the Constitution wherever he could discern it, his adversaries made his argument into a *prima facie* case of moral defect. Instead of offering a forthright defense of his inegalitarian views, his adversaries charged, he added duplicity to inequality by denying that his personal political views determined his interpretations of the law.

Whose record?

Nikki Heidepriem, a media specialist within the progressive community, put her finger on the nature of the anti-Bork campaign: Whereas in election campaigns, issues are legitimate, "here, your issue agenda has to be a demonstration of why his philosophy is unacceptable." As the progressive community's focus-group report put it, "The overall sense that he is an extremist is a more powerful argument against him than his stand on any single issue."

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Still, particular issues do help to show what Bork was up against. Thus Bork ran into difficulties when senators learned that he did not believe in the egalitarian commandment "one person, one vote"—that is, each person's vote is to count the same as everyone else's—either as an inviolable preference or as a "right" enshrined in the Constitution. State governments, Bork argued, could have adopted the principle if they chose, but they had not done so before the Supreme Court spoke; all but one state had a bicameral legislature in which representation was based on districts' areas as well as their populations. And there are, after all, two U.S. Senators from each state, a blatant violation of the commandment. That most of these senators were hardly aware of the contradiction is apparent. It is also clear that if compelled to decide today, they could not think of an argument that would justify the United States Senate. How extraordinary for a branch of the legislature to turn down a nominee on the grounds that he was determined to be guided by their will, as well as by the will of prior deliberative bodies back down to the constitutional ratifying conventions and the Framers.

Like everything else, "privacy" was also converted into an issue of equality. It was rich people's access to "safe abortions" that made it unconstitutional, in liberal eyes, not to provide funds for abortions for poor women. Much depended on how the matter was put. A constitutional right to abortion might not get as much public support as a presumed right to the privacy of one's bedroom, which is not to say that abusing a child in private is constitutionally protected. As Michael Pertschuk and Wendy Schaetzel show,[1] the progressive (read: egalitarian) forces opposed to Bork were skillful at getting their version of privacy to be the one discussed in the media and inquired about in the Senate. Had the focus changed to the tax returns of governmental officials, Bork's antagonists might well have preferred a lot less privacy than Bork.

Or take the charge that Bork favored corporations. In a different context such a complaint might appear peculiar because the nation depends on business for prosperity. "Favoring business," moreover, is the explicit object of various programs designed to increase competitiveness. To egalitarians and their allies, however, favoring corporations meant giving more to those who already had

[1]Michael Pertschuk and Wendy Schaetzel. *The People Rising: The Campaign Against the Bork Nomination.* Thunder's Mouth Press. 304 pp. $13.95 (paper); $24.95 (cloth).

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more than they deserved while depriving those who had less of the little they had. If not exactly a violation of the statutory law, it was at least a moral lapse.

How did his opponents prove that Judge Bork was partial to "the corporations"? One Bork decision favored a union, and Ralph Nader's Public Citizen group said that unions were in the "business of representing workers"; Bork was therefore pro-business. Then there was the case of a rancher who Bork decided could collect damages because government action had rendered part of his land unusable. Ranchers are in business, right?

Far worse than this stretching of the record was the method used—citing only cases in which there were dissents on Bork's D.C. Circuit Court of Appeals, 56 out of more than 500. Actually, as Ethan Bronner shows in his fair-minded and enlightening book on the nomination,[2] Bork's panels were unanimous 90 percent of the time, and Bork was in the majority 95 percent of the time. Had these larger numbers been used, of course, Bork's record could not have been made to appear deviant.

Whose understanding?

The dispute over egalitarianism sheds light on the flap over the jurisprudence of "original understanding." Egalitarians do not believe that present inequalities can be justified by reference to the past. Regarding authority as a way to institutionalize inequality, they—like the appropriately named literary deconstructionists—seek to deny the authority of the constitutional text when they believe that it is used to perpetuate inequalities. It would not be going too far to say that Robert Bork's doctrine of "original understanding" is accurately perceived by his adversaries as the major intellectual obstacle to the realization of their desires.

Developing and defending a doctrine of "original understanding" is not easy, nor can it (or any other formula applied to diverse conditions) be entirely consistent. However hard one tries to leave out the effects of contemporary social forces in favor of discovering and applying "original understanding," these effects are bound to create inconsistencies. Suppose that the original understanding of the guarantee of freedom of speech is murky, yet a consensus has grown up around certain interpretations. How does one distin-

[2]Ethan Bronner. *Battle for Justice: How the Bork Nomination Shook America*. W. W. Norton. 399 pp. $22.50.

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guish this consensual, evolutionary adaptation from the changes urged by those who substitute their own notions for the original understanding? Suppose, as Bork does, that one also values stability and order; then long-held and deeply entrenched interpretations, even if they depart from original understanding, may be acceptable. Thus Bork has to qualify his doctrine by saying that he would not disrupt the economy if, say, the existence of paper money ran counter to original understandings.

A similar problem is that in order to reestablish a narrower and stricter doctrine of judicial interpretation, recent rulings would have to be overturned. Maintaining the law by reversing precedent sat uneasily with the proponents of original understanding. Bork's ambivalence, even in his book,[3] between overturning decisions without evident constitutional warrant and merely restricting their future applicability by adopting tests of disruption, reasonableness, community sentiment, and the like was not, as his adversaries claim, an underhanded way of gaining confirmation by suggesting that he was not so dangerous, but rather an honest expression of the fundamental dilemma facing conservatives caught between the principle of *stare decisis* and the flaws of recent decisions.

Bork does about as well as might be expected in grappling with these inherent difficulties—fairly well but not entirely well. For he has more than a formula in mind. According to Bork, a judge interpreting the Constitution should begin with original understanding, supplement it with a belief in the maintenance of the existing order through elected representatives, and touch it off with a dose of common sense based on the tacit consensus among judges about good legal craftsmanship. This is not something that can generate decisions by computer, but it provides both direction and flexibility. True, judges applying original understanding might sometimes disagree, but they would disagree far more with those applying a different standard. The other side of the flexibility of Bork's doctrine of original understanding, the side feared by his critics, was that a flesh and blood judge, confronting new circumstances, could actually apply it.

If one were to reverse field and ask Bork's enemies (opponents become enemies when they deny each other moral legitimacy) to justify their "damn-the-Founders-full-equality-ahead" approach,

[3]Robert H. Bork. *The Tempting of America: The Political Seduction of the Law.* The Free Press. 350 pp. $22.50.

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they would have a great deal more difficulty. Few, after all, are prepared to say that the Constitution does not matter. In practice, however, they do have a counterpart to original understanding: the legacy of the Warren and Burger Courts, it might be called "egalitarian understanding." It is this egalitarian understanding, justified by prior judicial decision but not yet ratified in the court of public opinion, that leads them to say that Bork is outside their mainstream.

Bork argues that the consequence of saying that the Constitution is whatever judges want to make of it is judicial tyranny. He scores points by observing that this is exactly what the Taney Court did in the *Dred Scott* case before the Civil War, when it discovered a new right to own slaves in its version of substantive due process. When Bork says that those who read new rights into the Constitution are "authoritarian," he means that they do not allow the political process to work its will.

His assertion that egalitarians disregard democracy when they regard its outcome as inegalitarian rings true. Nowhere is this more evident than in regard to the death penalty, which, as Bork notes, the Constitution mentions as a possible punishment three times, going so far as to hedge it about with procedural restrictions. Public opinion supports the death penalty for heinous crimes. Rather than fight the matter out in public, however, efforts are made to put it beyond the reach of legislative and executive politics by claiming, as Justice Brennan does, that it constitutes "cruel and unusual punishment." To Brennan and his allies, original understanding is at odds with equality of condition, for it is claimed that black people suffer disproportionately from application of the penalty. In short, judicial activism is used to make up for inegalitarian opinion.

Whose politics?

Debates can turn on the struggle over whose way is deemed natural. Thus conservatives claim that the egalitarian tendencies of the Warren and Burger Courts are unnatural departures from the essential nature of the Constitution, so that radical rejection of recent precedents is required. When liberals see themselves as stalwarts of the existing order while conservatives consciously try to overturn it, something important is afoot.

Among the many contributions that the Bork affair can make to our education is the recognition that the dividing line between

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conservatives and liberals is not, as so often claimed, that the former hate change and the latter love it. Once we identify the values at stake—equality of condition for progressive American liberals, economic individualism for conservatives—we can see that a more straightforward proposition is correct: people like what they like and dislike what they dislike. Egalitarian liberals were defending the status quo in constitutional interpretation; indeed, the very point of declaring Bork outside the mainstream was to make sure that their beliefs were recognized as the status quo so that they could accuse conservatives of threatening to take away hard-won gains. If greater equality of condition was not merely a proposal but a right, it was more fundamental and hence more valuable than more temporary preferences. After all, if egalitarians had the rights, their opponents would be stuck with the wrongs.

As Bork accuses his opponents of politicizing the judiciary by inventing new constitutional rights, while they respond that he is doing the same by restricting rights that minorities already enjoy, we become aware that when values are in conflict there is no way to avoid playing politics. For there is always some expansion or constriction that would do better or worse for some interest or value than the alternative. Indeed, "what ought to be political?" is a political question. What sort of politics is most desirable would be a better question.

Those favoring greater equality of condition seek to enshrine their dominant value as the law of the land. In doing so they follow the time-honored tradition of seeking that point of access to decisionmaking that is most favorable to their views. The difficulty for egalitarians who believe that decisions can be legitimated only by personal participation is that the judiciary is also by far the least participatory branch. When Pertschuk and Schaetzel entitle their account of the Bork battle *The People Rising*, they obscure the difference between the progressive community's activists, who did indeed rise to the occasion, and the citizenry that did not (unless one counts focus groups whose reactions were used for purposes of manipulation).

Bork's opponents were right to worry. Bork did want to "drop the entire notion of group entitlements. That meant an end to racial, ethnic, and sexual quotas." My guess is that if this proposition were put to a referendum it would win by a big margin. But to Senator Kennedy, like other egalitarians, there is something wrong with neutral principles "if the result is that Congress and the courts

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must be neutral in the face of discrimination." Here is equality of results writ large. Bork's fault, Kennedy continued, was that "[h]e would allow majorities to write laws that give greater weight to some people's vote than others and that is the opposite of democracy." How extraordinary that an important democratically elected official should criticize "allow[ing] majorities to write laws."

The Supreme Court, of course, is part of a larger political process. Its members are nominated by presidents and confirmed or rejected by senators elected by the people. Over time, therefore, we would expect the Court, as Mr. Dooley put it, to follow the election returns. (Observe, however, the approbation Bork's opponents give to the current Court's octogenarians for their effort to outlive the people's choice of Republican presidents.) It is also true that political value judgments are inherent in cases the Court decides. But does this ineradicable political element mean that the Court is political in the same sense as a political party or a legislature or an elected executive? If there is no difference, why not subject the justices to democratic electoral responsibilities? If there is no difference, or only a little difference, why accept the verdicts of courts as anything more than partisan judgments, or the Constitution as anything more than the latest party manifesto?

Though Bork failed to wean liberal legislators from their dependence on judge-made law for their liberties, the nation owes him an enduring debt for his insistence (to the point of inviting the defeat of a worthy lifetime ambition to serve on the highest court in the land) that it is the people and their elected representatives who must defend our liberties if they are to be successfully preserved. The view that the Supreme Court, or any court, or indeed any guardian elite, could preserve the liberties of a nation is ludicrous. Even to state the proposition baldly is to reveal its nonsense: when the Court is most needed to preserve liberty—that is, when intense majorities are determined to act against it—it is least useful. The case of the forced relocation of citizens of Japanese descent during World War II, often referred to by senators as the kind of thing that they wanted future justices to prevent, is proof positive that the senators' hope is misplaced. Everyone now is certain that relocation was unnecessary as well as abhorrent, but this judgment does not reflect the passions of wartime 1942 when so many feared invasion and invoked "the law of necessity" in taking no risk (or so they thought) by denying liberty to Japanese-Americans.

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We the people, Professor Bork keeps trying to teach us, are the only possible guarantors of our liberties. "The tempting of America" mentioned in his book's title refers to the belief that the courts can substitute for the political process as a whole. How comforting to a generation of law students to imagine that they have in their hands (or their briefs) an Archimedean lever of change whereby a lowly but valiant lawyer sitting in a library cubicle writes a brief to another lawyer called a judge, who issues orders righting the injustices of this world. Absent from this vision, unfortunately, are ordinary people attempting to persuade one another of the virtues and vices of important policies arousing strong emotions—like the death penalty or affirmative action. Had there been debates on these issues, we might have reached a consensus; at least we would have had the chance to influence others in a deliberative process culminating in majority rule. But there have been no such debates, which is why these issues never seem to be resolved; they have not in fact been dealt with.

In the last third of the twentieth century, egalitarian movements have tried to reduce what their adherents believe are unwarranted distinctions: the power differences between men and women, blacks and whites, "gays" and straights, adults and children, old and young, experts and laymen, animals and people, and more. The degree to which such differences are considered proper is a product of negotiation among contending social forces, and therefore it changes over time. No one, certainly not Bork, claims that the Constitution froze the power differences that existed in 1789 or 1865 or 1898 forever into the fabric of American life. He wants conflicts other than those memorialized in the Constitution to be carried on in the political arena, not primarily through the courts. By contrast, egalitarians—believing that those who have fewer resources than others face insuperable disadvantages in the political arena—wish to right the wrongs, to remedy the inequalities, by reading the Constitution to guarantee greater equality of condition.

This desire explains the rooting of egalitarian rhetoric in the language of rights, as in civil rights, women's rights, "gay" rights, and animal rights. Egalitarians persuaded themselves that rights as they conceived them belonged to the kinds of people they thought needed them. In their minds and hearts it followed that anyone who denied that greater equality of condition was enshrined in the Constitution had stolen it away from those who needed it the most.

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Hence they convicted Bork of the most dastardly deed in their lexicon, the crime of inequality.

Whose opinion?

But why, if public opinion and legislative majorities are not prepared to support a constitution interpreted through the lens of egalitarian understanding, did the public not rise up against the new judicially created rights Bork opposes? Bork skirts this issue in his book. He is correct in saying that his views were distorted and that the major media opposed his nomination in their news stories as well as their editorials. That, however, does not explain enough. The Court really cannot get away with anything it chooses, but only with those ventures in which its opinions can attract significant support. What does the campaign against Bork show about support for the Warren and Burger Courts' egalitarian decisions?

If we looked strictly at mass public opinion, we would cite popular sentiment to account for the Court's invention of a constitutional right of privacy, but not for the Court's discovery that the death penalty is unconstitutional. Indeed, though the abortion rights that flowed from the right of privacy have remained, the abolition of the death penalty has not stuck. Why? Many more people suffer from crimes of violence than from the absence or presence of abortion. It could be said that crime constitutes the most serious deprivation of liberty in America today. This accounts for the steep penalties imposed for repeated offenses. The oft-repeated line that the death penalty is anti-black, anti-Indian, anti-poor (if this litany reminds the reader of the accusations against Bork, it should) is more difficult to drive home to those many citizens who consider themselves victims.[4]

Consider an incident that was recently reported in the *New York Times* concerning a New York City police officer, born in Puerto Rico but of Jamaican origins, who described himself as a Hispanic. When his 66.5 score on the Sergeant's exam was above the cutoff for blacks (65) but below the cutoff for Hispanics (69) and Caucasians (75), he asked for reclassification as a black and was rebuffed by the state appellate court. As part of its news report, the *Times* wrote that "the department set different passing scores to

[4]There is, to be sure, nothing inherent in death sentences that compels us to view them as inegalitarian. Criminals could be viewed as too strong and their victims too weak. Why it is that race or income is the dividing line, rather than the perpetration of murder, is of great interest in and of itself but would take us too far afield.

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insure that black and Hispanic members have the same opportunity as whites to pass the test." Is this misuse of the language, or has "opportunity" been redefined as "result"? I do not believe that most citizens would approve of setting different passing levels for different races. No doubt Bork had something like this in mind when he urged taking such matters out of the courts and into the more open arena of electoral politics.

In a way, however, affirmative action and related principles can be placed in the more participatory political arenas any time an elected representative thinks it worthwhile to bring them there. A sobering thought for the "let-the-people-through-their-representatives-decide" school is that the most conservative administration of our time, led by President Ronald Reagan, elected by huge majorities, had an opportunity to end affirmative action by executive order and did not take it. The President's advisers disagreed over whether the benefits of such an order would exceed the costs of the expected charges of racism.

Whose strategy?

This brings us to the question of why Bork's enemies were able to mobilize so quickly and powerfully against him while his political friends were slow to organize and lacking in clout.

Judge Bork's intellectual position attracted enemies but repelled friends, all but those few who knew him personally or were acquainted with his scholarship. Some say that Bork alienated his senatorial questioners by appearing to know more about constitutional law than they did, which was true on both counts: he did know more, and they were put off. It is only natural that in his book Bork wishes, knowing the outcome, that he had really told them off. Looking ahead instead of back, Bork softened his replies, giving his questioners more credit for coherence than they deserved and appearing more conflicted and contradictory than he was (e.g., he was for original understanding, but not if it led to ridiculous results or contravened deeply held and widespread public preferences). Bork's effort to appear reasonable, as his political coaches told him he must, as well as his own disposition to admit of qualifying facets, left him exposed to the one line of attack to which he was vulnerable: generalists might not know much about constitutional law, but they could talk knowingly about a contradiction that they thought they heard in front of them.

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The tone of the Bork hearings was so defensive as to suggest that if Bork were Bork he could not be approved. Seemingly endless testimony by his friends was devoted to explaining why his bite as a Supreme Court justice would not be nearly so bad as his bark as a professor. Thus his defenders told the Senate Judiciary Committee that as a professor seeking to establish new theory, as he had in the antitrust field, his tone had been combative; but it would be appropriately conciliatory if he were a justice. Very often he was defended by analogies to noted instances in which justices who were thought to be on one side ended up on another. His defenders seized upon the times when Bork indicated that he might expand his views on the scope of free speech or of privacy to show that he could indeed change. Yet if his initial views were insupportable, why nominate him?

The irony is that Bork's personal policy preferences did not comport with those of many conservatives, while his efforts to disengage himself from the strict consequences of original understanding by saying he personally did not desire them fell on deaf liberal ears. By the time the egalitarian onslaught reached the ears of conservatives—that is, when conservatives were finally persuaded by egalitarian arguments that Bork's theory of constitutional interpretation favored them—it was too late. Bork's defense was at once too much for his opponents and too little to attract those who would have been supporters.

The "success of the anti-Bork forces in controlling the terms of the struggle," as Bronner aptly puts it, "was found in the behavior of the pollsters." They so loaded the questions to which the public was asked to respond against Bork—"turn back the clock, limit the rights of women and blacks, and make abortion illegal"—that such positive phrases as "eminent and experienced jurist" likely had no effect. That was how southern senators learned that 51 percent of their constituents opposed Bork and only 31 percent favored him—a result that was, in Bronner's words, "enormously influential." Had the various pollsters not been inclined to an egalitarian ideology, they would have seen that they were prefiguring the outcome against him.

Other types of bias, now taken for granted, also operated against Bork. Observe how balanced (by race, gender, and ethnicity) committees for almost every purpose have become. Members of these groupings are not chosen at random but from ideologically attuned activists. Thus "balance" is achieved by adding people of

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egalitarian preferences. This explains why the American Bar Association's Standing Committee on the Federal Judiciary, which gives advice on federal nominees, had a liberal bias and why, therefore, the Reagan administration eventually refused to deal with it. The informal balance requirement, expanded to include "political balance," also explains why four members of a fifteen-person committee of the American Bar Association voted that Bork was unqualified because he lacked "judicial temperament."

Look through the eyes of Pertschuk and Schaetzel (who have written the best account of movement mobilization that I know) at the diverse groups opposed to Bork: the Leadership Conference on Civil Rights, the National Abortion Rights Action League, the National Association for the Advancement of Colored People, Public Citizen, the National Education Association, People for the American Way, and many more. How did they come to believe that the Bork nomination posed a threat to their interests or their constituencies? According to Pertschuk and Schaetzel, Nan Aron of the Alliance for Justice persuaded Leonard Rubenstein of the Mental Health Law Project that Bork posed a severe threat to the rights of the disabled, upon which he persuaded some thirty organizations concerned with mental health and disability, including the Epilepsy Foundation and the National Mental Health Association, to oppose Bork. After all, if Bork failed to find certain other rights in the Constitution, he might fail to find theirs. Together with Ralph Nader and others, Aron persuaded Brock Evans of the National Audubon Society that "Bork seemed to come up four-square for business or anti-environmental interests every time he had a chance." They said that Bork would deny standing to those who could prove no evident harm. Although the Audubon Society did not take a formal stand, Evans recalls, "we [the staff] were all certainly there in spirit and talked it up." Thus Evans advised Senator Durenburger to "forget about the Arctic National Wildlife Refuge. [Bork is] the environmental issue that we really want you to work on."

The members of the anti-Bork coalition knew each other from prior struggles over civil rights. When they did not immediately recognize one another, "Ralph Neas puzzled some Steering Committee members by taking up precious time ... by patiently asking each person in the room to identify himself or herself and his or her organization." The reason, Pertschuk and Schaetzel tell us, "soon became clear: the roll call was both a socialization process

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and a security check." It turned out that the suspiciously "clean-cut looking" men were from the Americans United for the Separation of Church and State. As Mrs. Thatcher might have put it, they were "one of us." Had Bork thought to follow a similar procedure when giving a talk to the Federalist Society, he would have found one of his opponents' staff there taking notes for future use against him.

The anti-Bork coalition was both centrally directed and locally run. General direction, such as suggestions about the type of appeals to make or what to avoid (the abortion issue), came centrally. Local groups could decide differently, but if they went too far they faced moral pressure—you're harming the cause of equality—from the center. What made it all fit together, since no one could compel anyone else, was a shared belief: Bork threatened to halt or reverse egalitarian advances. This was coordination by ideology, and it worked.

A crucial decision of the anti-Bork forces, reached not without internal dissent, was that no one who identified with the progressive community should testify, in order to prevent charges of their extremism from becoming the center of the hearings. Instead, they chose to make Bork the extremist, characterizing him, in Bronner's words, as being in favor of "birth control police, poll taxes and literacy tests" for voting.

The anti-Bork forces worked hard to win over the media. They did exhaustive research, answered questions, and fed their views to all who would take them. In this they were helped by the expectation (though not the certainty) of a favorable reception. In all the major media, they had people who were part of what they called the progressive community.

Not to take chances, the anti-Bork forces used focus groups to decide what appeal they might make to whom. Most anti-Bork messages inspired only boredom. But two were resonant: invasion of people's bedrooms (a worry to men) and control over their bodies (a worry to women). Nothing for it, then, but to accuse Bork of bringing about whatever these unsuspecting citizens feared most.

For all practical purposes, as Fred Wertheimer of Common Cause noted, "It was simply a question of who won the battle for the Southerners, and it would be won by blacks in the South...." Why should senators accept the taint of racism for a nominee whose views on judicial interpretation they could hardly understand? Why not get another conservative justice without the taint?

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In politics, after all, it is not only the truth of an allegation but how intensely its partisans feel that matters. If constituents say they would interpret a vote for Bork as a vote against them, that is a political fact. In politics, unlike logic, the frequency with which a statement is made helps determine whether it is received as true.

And what if the mass of citizens wishes neither to support group entitlements nor to disturb them where they exist? In this way they do not have to choose between accepting a bad principle and openly denying that certain groups deserve special assistance.

Neither the senators nor their southern constituents wanted to reignite the civil-rights struggles of the 1960s. They may have agreed with Bork in private, but they were not prepared to take the consequences of supporting such views in public. They wanted those unhappy days behind them. If organizations with credibility among their black constituents said a nominee was racist, therefore, they were not going to look behind that. Being accused of racism is like being accused of child abuse: even after an acquittal, the charge is so vile that some of the stain always sticks. Whatever he said or did, Bork could not overcome the stigma of inequality.

Whose cause?

It is not often that a person's ideological trajectory becomes an open matter for public discussion. Since Bork had not always believed what he believed when he was nominated, he was at pains to explain his transformation. In 1963 he wrote in opposition to the pending Civil Rights Act because, as a libertarian, he saw it as substituting governmental coercion for what should have been unforced individual consent to desegregation. As he became socially more conservative, Bork shaded his views toward community norms rather than unrestricted privacy or free speech. At the same time he retained a libertarian perspective on market transactions (hence his fairly successful advocacy of consumer benefit as a guiding criterion in antitrust cases). When a person is an economic individualist and a social conservative in regard to different aspects of life, it is not easy for him to demonstrate logical rather than cultural consistency.

It is said that Bork harmed his own case at the hearings by not making his own appeal to the emotions of his audience, and there is a certain truth to this claim. Even when senators on his side set him up with "fat pitches," he steadfastly refused to hit home runs.

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When an Arlen Spector advocated no limits to free speech, for instance, he could have replied that a community like Skokie had the right to prevent Nazis and Klansmen, with firearms under their sheets, from proclaiming their murderous ways. No Ollie North, Bork passed up these invitations to score for the home team.

More than three decades before, watching on television, I mentally berated Joseph Welch, the lawyer in the Army-McCarthy hearings, for not opposing Senator McCarthy's grossly inadequate knowledge of Communism. Far wiser than I, Welch understood that this was not an intellectual debate but a contest for the sympathy of the American people. But Welch was not on trial; Bork was. Nor was Welch trying to live up to a self-image in which grace under pressure meant adhering to a strict personal code.

Sometimes, when Bork refused a helping hand, he did so to indicate that his argument did not need help. At other times his inner fastidiousness rebelled against being tempted to come up with a mawkish, heart-on-his-sleeve line. Even as an opposition senator blundered into accusing him of making too much money from outside fees when he was a professor at Yale (as if making money were immoral), Bork viscerally recoiled at bringing out that this was a time of heavy medical bills as his wife was dying of cancer. What, exactly, was he unwilling to tell the Senate? What the next justice to sit on the Supreme Court said.

At his confirmation hearings, Judge Anthony M. Kennedy was asked whether he practiced that vicious, depraved, and disgusting thing, doctrine. No, said Kennedy (wise to the ways of this new world), he would never have any principle so unprincipled as doctrine. Kennedy then proceeded to tell his interlocutors that he would decide each case on its merits. Imagine: a person who has spent a lifetime on the bench has to deny that he sees connections among cases!

Asked why he had until recently belonged to clubs that excluded women and minorities (no privacy there?), Kennedy replied: "Over the years I have tried to become more sensitive to the existence of subtle barriers to the advancement of women and minorities in society." The Judiciary Committee questionnaire included a query about the qualities a Supreme Court justice ought to have (something like being asked to write about your summer vacation): Kennedy began with "compassion, warmth, sensitivity, and an unyielding insistence on justice...." Here you have it: Bork would neither

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repeat back the egalitarian code words—compassion, sensitivity, let alone the "touchy-feely" warmth—nor would he keep repeating the word on which he had spent his life and to which his record as a man and a lawyer and judge spoke. If, by the time a judge was nominated for the Supreme Court, he still had to proffer his belief in justice, something was wrong. If public sentimentality was in, Bork was evidently out.

In addition to confronting multiple audiences—senators, legal colleagues, the general public and himself—Bork was hurt by conflicting advice. Stick to principle; no, it won't hurt to bend a little. Show up the senators' ignorance of constitutional law; no, stroke them a little. It's hard to be a happy warrior when you're not happy with yourself. To show that he was fighting back, for instance, Bork presented Supreme Court briefs in which he participated as Solicitor General supporting the rights of minorities and women. No doubt this was supposed to rebut charges of racism and sexism. By the very act of countering such charges, however, Bork gave them legitimacy. If it wasn't proper to look at results by race and gender rather than at relevant constitutional provisions, why were the Bork forces doing it?

Possibly, Bork might have asked himself why he had to shoot off his mouth (I use the locution of one doubting his own judgment) on cases like *Griswold* v. *Connecticut*, in which the constitutional right to privacy was created. Who asked me, he might have muttered to himself, to speak and write about an idiotic law forbidding the sale of contraceptives, which would have collapsed amid either laughter or horror the first time it was enforced? *Griswold* was a good case, though, to make the larger point that it was not a judge's business to prevent governmental idiocy unless he had a warrant in a constitutional provision. Had Bork refrained from expressing himself when he had no duty to do so, he might well be on the Court today; still, though he might have been richer in title (as such things are counted in this world), the nation would have been poorer.

Nonetheless, constitutional discussion has been noticeably cooler since the Bork example: if you want to be a judge when you're older, don't talk so much when you're younger. A chill has come over the process of discussion through which ideas are encouraged, deliberated, winnowed, and otherwise treated to the free-for-all hurly-burly of public airing. It is not only Bork but all we political groupies, including his adversaries like Pertschuk, who

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will be disqualified because we are so foolish as to voice our ideas in public. It is sad to see members of the political stratum use their commitment to participation to deny the inevitable concomitants of that activity—ideas that other people do not like, or ideas that upon more mature consideration or the accumulation of more evidence do not appear as attractive as they once did.

Whose ideology?

"Our most divisive political battles," Bork declares, "reflect the war in our culture about what should be the evolving morality of our tradition." Whatever that morality might be in America, it always comes out as a dispute over different visions of equality, whether this be equality before the law, equality of opportunity, or equality of condition.

We all revere the Constitution because we read it differently. Thus the Constitution not only reaches out to us, but we reach into it, maintaining or altering the original understandings to support our preferred vision of equality. Believing as we all do that the Constitution supports our values, we come to believe that they must have been there all along.

Judge Bork was accused of favoring inegalitarian outcomes. This accusation was both true and false. Bork did not take sides; it would be repugnant to him to favor the wealthy or wellborn. Yet it is true that Bork was prepared to *accept* inegalitarian outcomes. Accepting the desirability of competition and therefore the unequal outcomes that often accompany competition, Bork was evidently not shocked or scandalized by inequality. His conscience might be more tender toward those whose exceptional talents were thwarted by regulation and redistribution than toward those who wanted more than their meager talents could justify. Worse, from his adversaries' standpoint, he believed that people of talent could rise even if they initially had to enter competition with far fewer resources than those already well established. Bork's crime was that he not only believed in the values that had once made America exceptional, but that he also built a doctrine of constitutional interpretation around them.

What we learn from the Bork nomination is that we can no longer count on common values among contending politicians to soften political disputes. Our inability to derive joy from the triumph of democratic capitalism abroad is explained by the rise of ideological warfare over equality at home.

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Politics, nonpartisanship, and the public service

EDWARD J. LYNCH

AS PRESIDENT Ronald Reagan left office, he lamented that his administration had been hampered by what he called the "iron triangle" of special-interest groups, congressional cliques, and the media. Reagan did not coin the term, but he did break ground by designating the media (instead of the career civil service) as one of the triangle's sides. Perhaps Reagan thought that to retain the bureaucracy in the iron triangle would have been to concede that neither he nor his appointees had ever fully controlled the executive branch.

Such a concession would contain more than a grain of truth. In official Washington's eyes, however, Reagan's efforts to control the administrative apparatus went too far. Thus the National Commission on the Public Service, chaired by Paul Volcker, concludes that Reagan's appointees too often interfered with the workings of the career civil service. Reviewing government operations, the Commission laments that "too many of our most talented public servants ... are ready to leave," while "[t]oo few of our brightest young people ... are willing to enter," even though "the need for a strong public service is growing, not lessening."

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The Commission's report, *Leadership for America: Rebuilding the Public Service*, waxes eloquent in stressing the importance of public service:

> [W]e call for a renewed sense of commitment by all Americans to the highest traditions of the public service—to a public service responsive to the political will of the people and also protective of our constitutional values; to a public service able to cope with complexity and conflict and also able to maintain the highest ethical standards; to a public service attractive to the young and talented from all parts of our society and also capable of earning the respect of all our citizens.

Still, the report makes forty-five recommendations to improve the public service. These recommendations are laced with hostility toward recent political appointees. The Commission urges the next administration to reduce their number from 3,000 to no more than 2,000, with most of the cuts coming from the Schedule C appointees who serve as special and confidential assistants to senior political officials. Presidential agendas, the report claims, would be better implemented if career civil servants had more impact on political decisions made at the highest level, thereby strengthening their ability to shape policy.

The Commission's work has been favorably received. President Bush has praised it, and many members of Congress—especially those who have many civil servants as constituents—strongly support the recommendations. The Commission failed, however, to consider the consequences of handing career civil servants more political responsibility; as a result, it has provided neither an adequate analysis of a democratic public service nor an adequate response to current shortcomings.

Defining the problem

The report's introduction laments the "lack of respect" that, it claims, now confronts "public servants who struggle to make ... policies work"; it partially attributes this lack of respect to the propensity of recent presidential candidates to seek office by running against the government. (The Commission expresses relief that neither major-party presidential contender in 1988 emphasized such overt hostility.) One of the long-term consequences of what the Commission calls "bureaucrat bashing" is that talented young people have acquired a poor image of public servants, which hinders recruiting. Even worse, dedicated career civil servants have felt unappreciated, and so many have moved to the private sector.

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A "quiet crisis" has resulted from an erosion of talent within the civil service; the public now believes that government is inadequately responsive. In the Commission's view, "Public trust will not be restored unless and until Americans are reassured that those in charge at the top of government will honor their trust and those in the civil service below will commit themselves to the highest levels of service."

Despite conceding that general opposition to government might be grounded in opposition to specific programs, the Commission never concedes that the very existence of these programs might reasonably be challenged. It assumes that policy disputes do not stem from disagreements about the appropriate role of government; instead conditions are alleged to be highly technical, requiring complex analyses and precise definitions of alternatives before options are presented to political appointees for decisions. The Commission would assign these analytical and formative tasks to career civil servants; it dismisses the suggestion that political appointees might have legitimate interests in shaping the ways in which data are assembled and options devised. "Politicization" is an unreservedly pejorative term for the Commission, which would enlarge the role of career public servants while restricting the role of political appointees.

Although the report often speaks respectfully of high-level political appointees, a negative tone dominates its evaluation of them. The mere size of the turnover of political appointees at a transition "guarantees management gaps and discontinuities.... It is difficult to find several thousand well-qualified appointees in fewer than six months." Even when well-qualified appointees are found, "they are often given little or no orientation about their new responsibilities, in large measure because those doing the recruiting may know little about the substantive demands of the jobs."

These problems of recruitment are exacerbated, in the Commission's view, once appointees gain office. The president cannot oversee all of his appointees; many of them have their own constituencies, which may lead them to substitute their own agendas for the president's. In addition, political appointees allegedly serve shorter terms than career civil servants, and frequent turnover contributes to program instability.

The Commission's most prominent concern, however, is that giving political appointees authority over career civil servants tends to discourage the "talented young men and women" of the career

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civil service. To the extent that top-level appointees rely upon politically selected colleagues, they are likely to ignore the perspectives of career professionals. Yet career civil servants—especially those at the level of the Senior Executive Service (SES)—"know how their institutions work and how to work their institutions."

Critique of political appointees

The Commission's critique of political appointees depends on the contrasts that it draws between them and career civil servants. In several respects, however, its comparison is misleading.

The Commission argues, for instance, that the turnover among political appointees necessitates frequent efforts by career professionals to educate their new superior and a cadre of special assistants. As the Commission's Task Force on Political/Career Relationships describes the turnover problem:

> Fully 40 percent of political executives throughout the government stayed in their positions less than one year. In contrast, 70 percent of career executives have been with their agencies for 10 years and 50 percent of them for 15 years. Although the average tenure in office of Senate-confirmed Presidential appointees ... may have increased slightly because of the two full terms of President Reagan, the tenure of these top executives is still so short as to be disruptive.

This phrasing notably shifts the terms of comparison between career civil servants and their political counterparts. Appointees are measured by time in their positions, career servants by time in their agencies. Although 70 percent of career executives may have been with their agencies for ten years, few have held the same position throughout. Instead, like senior political appointees, career civil servants move through a succession of jobs before moving into senior positions. The Office of Personnel Management (OPM) has discovered that the average tenure in position for a member of the SES is 3.4 years—only a year and a half longer than that of the average political appointee.

The crucial difference between career professionals and political appointees has to do with the variety of government experience. According to OPM's SES profile, SES members average over ten years with their agencies, whereas political appointees at the SES level average more than nine years of government experience in various agencies. This difference may not redound to the advantage of career civil servants; a leading concern of the Civil Service Reform Act of 1978, which created the SES, was that

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career executives had become too attached to agency programs and not sufficiently diversified to be general managers.

Work within government, moreover, is not the only source of expertise essential to effective public service. Fair comparison of the experience that political appointees bring to their posts would include total government experience, experience relating to the public (as in campaigns and press relations), administrative experience, and substantive experience with the issues addressed by an agency—not merely length of time spent in the present position. The Commission did not gather, much less assess, such information. In short, although the Commission laments the alleged instability of political appointees, it neither judges their qualifications fairly nor considers the reasons for turnover in political ranks.

The Commission also complains about the increasing numbers of political appointees:

> From 1933 to 1965, during a period of profound expansion in government responsibilities, the number of cabinet and sub-cabinet officers appointed by the President and confirmed by the Senate doubled from 73 to 152. From 1965 to the present, a span when total employment and programs were more stable, that number more than tripled to 573.

The report further comments, "Presidents today are further away from the top career layers of government with 3,000 appointees—approximately 573 presidential appointees subject to Senate confirmation, 670 non-career members of the Senior Executive Service, 110 presidential appointees not subject to Senate confirmation, and approximately 1,700 personal and confidential assistants...—than was Franklin Roosevelt 50 years ago with barely 200."

These numbers, however, tell less than half of the story relevant to the Commission's recommended reduction in the number of political appointees. For one thing, an accurate analysis would consider the number of political appointees now working for Congress. Although the report claims that the number of career public servants has not increased since 1965, it ignores congressional staffers, who—like presidential appointees—have proliferated dramatically since 1960. Congressional staff work, of course, involves overseeing government activities, reviewing programs for authorizations and appropriations, and developing proposals for new programs—in short, political work directly related to functions commonly performed by mid-level political appointees. Congress now has 15,000 employees on staffs serving members and committees. If one adds the staffs of the General Accounting Office,

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the Congressional Budget Office, the Office of Technology Assessment, and other legislative support staffs, these numbers could double.

In other words, Congress has at least five times as many people working on its behalf as it authorizes the president to appoint to further his agenda. Furthermore, though our system of checks and balances lets Congress limit the number of political appointees hired by any agency, executive agencies cannot restrict the political activities of members of Congress or their staffs. No observer can understand the need for increased numbers of political appointees in the executive branch without considering legislative-executive relations.

Under current laws, the proportion of political appointees in the SES must never exceed 10 percent. In each individual agency, 75 percent of the SES cadre must be career civil servants. Thus Congress has hindered the development of a politically responsible administrative system. The Commission's Task Force would go still further; it proposes limiting the kinds of work that political appointees would be eligible to perform. Following a recommendation of the first Hoover Commission, the Task Force urges that only career professionals should be chosen as assistant secretaries for administration, charged with supervising their department's budget, personnel, and physical space. "Personnel decisions covered by the merit system," the Task Force explains, "must be scrupulously free of any partisan considerations."

The Commission's chief concern is to ensure continuity between presidential administrations in overseeing budgetary and personnel matters. Apparently it assumed that the definition of "merit" in the career service is uncontroversial. But this is implausible; if the merit system is not subject to political direction, how can an agency head who wants to change policies revise performance standards to reflect his new priorities? To raise such a question is necessarily to consider the link between politics and administration.

Administration without politics?

When Woodrow Wilson and his colleagues promoted the new science of public administration at the end of the nineteenth century, they wanted to differentiate it from traditional political science, which they understood as the academic study of political philosophy and constitutional formation. Administration came into

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play after the basic questions of political principles were settled; its purpose was to meet the political goals that had been adopted. The new science aspired to political impartiality; according to its credo, "There is no Republican or Democratic way to build a road."

The distinction was difficult to sustain in practice, even in Wilson's day. The Commission's Task Force on Political/Career Relationships casts the distinction aside altogether: "In the modern policy arena where the questions are whether to build the road and where to build it, policy cannot be strictly separated from administration." Unfortunately, the Commission does not acknowledge the implications of abandoning the distinction.

In the Commission's understanding, "The career executive is likely to present an institutional perspective, mindful of the longer term consequences of decisions. Short term, political criteria are likely to be taken into account by political appointees." This charge is chiefly directed at the lower-level political appointees whose jobs the Commission would severely restrict: "When political appointees are placed lower in the bureaucracy, they will put their own political spin on advice at an early stage in the process, and those at the top may never hear the straight views of career executives about policies." Career professionals, by contrast, have special concerns about program stability and continuity: "Career executives ... will still be operating programs and administering agencies after this season's political birds of passage have flown."

Such statements point to a crucial deficiency in the Committee's position: it consistently implies that political purposes are inevitably partisan, probably divisive, and definitely harmful to the public interest. But at the same time the Commission acknowledges—perhaps inadvertently—that politics and administration are inseparable; in doing so, it implicitly concedes that government operations cannot be separated from the political task of deciding the role of government. "Administration" cannot be altogether nonpartisan; the various ways of running the government tend to promote one or another definition of the ends that government should serve.

Although the Task Force reaffirms the priority of political appointees in defining agency goals, it recommends that the career service should be broadly responsible for listing options and selecting methods of implementation. It justifies doing so in these terms:

> Career civil servants have devoted their careers to managing the details of programs, and may even have helped to draft the legislation that

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> established those programs. They have the information upon which programmatic decisions must be made. They formulate the regulations that establish the rules for applying the law to specific ... cases. In addition, they are experts at applying the bureaucracies' own rules and regulations to the management of particular programs; they oil the budget, personnel, and paper flow parts of the bureaucratic machine.

This argument suggests, however, that career civil servants might resist the political control of presidential appointees who aim to curtail government activity. After all, who would devote years of his life to drafting legislation, devising and securing the adoption of regulations, establishing and operating organizations to implement a program, and then be dispassionate when "this season's political birds of passage" want to eliminate the program because in their view it is no longer in the public interest? Even in the worst stereotype, bureaucrats are not so stultified as to comply energetically when directed to assist in dismantling the agencies to which their professional lives have been dedicated—especially if the dismantling is recommended in the public interest. It is more plausible that employees who have been involved in the creation, development, and implementation of programs slated for abolition would seek the assistance of allies within the "iron triangle" to thwart the efforts of the political appointees. The Commission's dismissive reference to "this season's political birds of passage" better indicates the level of cooperation that political appointees can expect in such circumstances than the report's solemn affirmations of professionalism and dedication.

Even the Task Force does not expect such passivity among public servants. Instead, it reaffirms the guidance traditionally given to public servants: "[C]areer bureaucrats ... ought not to lose sight of the democratic imperative that Presidential appointees are the legitimate locus of decision-making in the executive branch. The appropriate posture of the civil servant is to carry out faithfully legitimate policy decisions despite personal preferences."

The problem, which the Commission skirts, is that civil servants often disagree with political appointees over what "legitimate policy decisions" might be. Otherwise the concerns that preoccupied the Commission would never have arisen. In practice, career civil servants do not take direction from political appointees alone; they are also swayed by statutes, budget resolutions, congressional hearings, and the opinions of key congressional committee members and their staffers. Career civil servants are usually familiar

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with interested constituencies, and they have access to sympathetic members of the media. When congressional oversight committees and the administration disagree about program goals and operations, Congress—through its powers to write authorizing legislation, to oversee program performance, and to appropriate program funds—expects career professionals to respond to its political determinations rather than to those of political appointees. Frequently, the institutional memory transmitted from career professionals to political appointees consists of information about the longstanding congressional interest in (and protection of) programs that political appointees might like to reexamine.

Past civil-service resistance

The expanse of every agency's programs is such that few new political appointees—even those who have worked in related fields—can be fully familiar with them. Career professionals have the important task of orienting them. In doing so, these professionals often assert that previous criticisms of the programs were exaggerated or poorly grounded. In 1982, for example, the State Department was still recommending that new political appointees study the Global 2000 report commissioned by the Carter administration—even though many of the "inevitable trends" forecast by that document ran contrary to President Reagan's clear message when, in one of his first official measures, he deregulated oil prices. "Political" criticisms of the document were not thought to justify its exclusion from the department's orientation program.

Career professionals commonly describe resistance to political appointees as loyalty to the agency's programs. Although many Reagan appointees at the Environmental Protection Agency had publicly and ardently supported economic incentives as alternatives to command-and-control regulations to improve environmental achievements, career professionals commonly affirmed loyalty to appointed leaders with formulations like these: "I really support the Administrator, and I want her to succeed because success will mean more effective enforcement of existing laws." In other words, civil servants defined the political appointee's success in terms of preexisting statutory or administrative objectives, rather than the president's or the appointee's priorities. One need not concede the legitimacy of goals established by political appointees to concur that there are many political elements to "administrative" disputes, and to recognize that career professionals have both

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programmatic and professional interests that do not lead toward neutrality in the related struggles.

Few programs better illustrate the determined resistance of career professionals than the executive branch's inability to implement the program authorized by Office of Management and Budget (OMB) Circular A-76. Although a policy barring government agencies from engaging in commerce was established in 1955 (and has been supported by every president beginning with Lyndon Johnson), no agency complied with a 1987 executive order strengthening the Circular and requiring competition with private bidders. Congress has enacted more than fifty legislative restrictions on contracting, from requirements that minimum numbers of federal employees be retained at specific military bases to outright prohibitions on contracting for certain functions. Where legislative prohibitions have not provided sufficient latitude to officials who do not want to become contractors, regulatory interpretations have given great leeway to those who oppose saving money through contract operations. Thus an exemption in Circular A-76 allowing government agencies to retain "services related to patient care" was interpreted by the Veterans Administration to apply to lawn maintenance at V.A. hospitals.

Similarly, though the Reagan administration made clear its opposition to the reauthorization of many "family planning" programs, civil servants provided much less support to their political superiors than to their congressional and interest-group allies who favored retaining the programs.

The budget process also demonstrates the divergence between career professionals and political leaders. Appointed agency heads are asked regularly about funding requests that OMB denied during the budget review. When political agency heads support reductions made by the president, career officials will be asked what they might do with additional funds that the congressional committees would like to appropriate. Although agency officials in such circumstances can legitimately claim to be serving the national interest, they understand the national interest as a congressional committee defines it—not as the political appointees do.

My point is not that political appointees are always "right" in their disputes with career professionals; it is only that the professionals can have their own—conceivably incompatible—views. No one need question the dedication or intelligence of career officials. Indeed, precisely because of their diligence,

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dedication, and intelligence, they tend to identify their agencies' interests with the national interest; thus they are formidable adversaries to political appointees who perceive the national interest differently. The real question in our era of divided government is this: if career civil servants take guidance from any source other than the president and his appointees, what legitimates their actions?

The Commission, however, ignores the political questions at the heart of the disputes about the roles of appointees in public service. Rather than attempt to relate concerns about numbers of political appointees to the surrounding political environment, it proceeds as if "nonpolitical" administration were still possible, even as it concedes that it is not. The Commission somehow concludes that government would work better if the institutional memory and specialized knowledge of career civil servants made a greater impact. But the restrictions on political appointees that it proposes can only impair the effectiveness of a president who might want to reduce or eliminate programs that no longer serve the public interest. The Commission has provided a classic example of a team of horses deciding upon directions for the coachman.

Congressional interference

The difficulties facing political appointees go beyond the resistance of career civil servants, reaching Congress itself. In fact, problems arise before the appointees are ever nominated. Congressional committees that oversee programs make every effort to ensure that potential appointees are sympathetic to commitments that have been embodied in legislation. Senate committees, as a result of their role in confirmations, endeavor to ensure that no agency head evinces hostility to the basic purposes of the agency even if the agency's mission is badly conceived, even if the president strongly opposes it. Thus, as long as Sen. Warren Rudman (R-NH) oversees the Legal Services Corporation, no successful candidate for the chairmanship will propose its abolition. Where obvious conflicts might exist between congressional intentions and prospective nominees, Senate committees can simply refuse to hold confirmation hearings, as the Senate Judiciary Committee did when President Reagan nominated Susan Phillips to chair the Federal Trade Commission. During the Reagan-Bush transition, several Senate committees refused to schedule confirmation hearings for Bush's nominees as long as some senior officials from the

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Reagan administration remained in place. The tension here stems more from the separation of powers than from partisan disagreements; Republicans are just as insistent on senatorial prerogatives as Democrats.

In some cases committee members charge that a nominee is unqualified; the nomination of William Lucas to be assistant attorney general for civil rights is a good example. But qualifications for senior political positions are hard to define. Qualifications can legitimately include managerial expertise and the ability to deal with Congress and the media; substantive familiarity with the relevant programs is not a *sine qua non*.

Often the allegations are really motivated by partisan disagreements. Insofar as it is true that "personnel is policy," it is not surprising that matters of political principle left unresolved by the electorate—consider such examples as affirmative action and abortion—are fought out when administrative positions are filled. These disputes are not confined to the selection of senior policy operatives, but extend to the choice of special assistants and of policy and press aides.

When political appointees take office, the authorizing and appropriating committees of Congress can use their power to impede the reshaping of programs. In its exercise of "legislative oversight," Congress frequently hampers the ability of executive-branch officials to develop alternatives. After the sale of Conrail in 1987, for example, Congress adopted legislation prohibiting the Department of Transportation from holding a conference to plan a similar proposal for Amtrak. Legislative restrictions prohibiting research or pilot programs are frequently attached to appropriations bills, especially now that the Supreme Court has removed the legislative veto from the congressional arsenal. Thus, although contractors were developing most equipment for the National Airspace System Plan, Congress enacted legislation prohibiting the Federal Aviation Administration from conducting a pilot study of contract maintenance—even while the General Accounting Office regularly reported that inadequate staffing in the maintenance workforce was causing major problems.

Once Congress has authorized a program, it tends to assume that the program's "needs" are established for all time. In testifying before Congress, therefore, officials representing administrative agencies cannot direct their primary attention to deficiencies in the premises of programs. Current authorizing

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legislation constitutes a *prima facie* assumption that a problem exists; even if a public official testifies that the program has failed, the "need" will still exist, and congressional directives will encourage more effective measures to achieve Congress's stated goals. Although Secretary of Housing and Urban Development (HUD) Jack Kemp arrived to find several programs plagued by scandals, for instance, the House Committee exercising oversight repeatedly cautioned him that the scandals did not justify abolishing the programs. Even though Charles Dempsey (a former HUD Inspector General) found that the problems began before the Carter administration, the House in 1989 increased discretionary appropriations for the scandal-plagued programs, with funds disproportionately directed to projects in the districts of Committee members. Nonetheless, when one HUD career official suggested that there is little difference between the attempts of former executive-branch officials and those of sitting members of Congress to determine the programs' beneficiaries, he was chastised by both Chairman Tom Lantos (D-CA) and Rep. Christopher Shays (R-CT).

If an administration finds deficiencies in a statute, its testimony is expected to include proposals for alternative legislation to solve the problems while retaining the objectives. Statutory objectives are rarely subjected to criticism; the executive may merely reform the means of achieving them. This is a favored congressional technique of restricting political debates to administrative questions.

Reviving political factors in administration

Regrettably, the Commission report provides no useful analysis of the role that political appointees should play. Rather than strengthen the president's control, the logical consequence of the Commission's recommendations would be to reduce the ability of a president and his administration to alter the direction of government. By limiting the number of political appointees, the Commission would shrink the pool of people suited to receive senior appointments in future administrations, thus precluding additional political changes in the future. Such restrictions on political appointees might serve the interests of current civil servants and established programs, but they do not necessarily serve the public interest.

Who should control the administrative apparatus of American government? The answer, for most of American history, was the

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appointed heads of the agencies, subject to laws enacted by Congress. Those who set up the academic discipline of public administration rarely mentioned the Congress, any more than the Commission report does. This omission was not a problem, however, only while Congress and the executive agreed about national policies.

Congress and the presidency have been controlled by the same political party for only twelve of the past thirty-six years. When the American people regularly elect presidents who want to reduce the size of government and to limit taxes, but simultaneously elect congressional majorities committed to expanding government, political tensions are bound to develop. For a variety of reasons, antagonism between career officials and appointed political leaders intensified during the Reagan administration. This development may suggest that difficulties are to be expected when the "political" desire to reshape the government encroaches on the "administrative" realm; these difficulties are especially resented by those who wrongly believe that their administrative responsibilities can continue to be divorced from political controversies.

The National Commission on the Public Service, like many other bipartisan commissions, endeavored to create consensus by ignoring America's political disagreements. This Commission, however, did not search for common ground among people involved in current disputes. Of the thirty-six commissioners, only Senator Charles Robb (D-VA) currently holds elective office. Many commissioners held appointive positions within the executive branch, but the list of such members—among them Anne Armstrong, John Gardner, Robert McNamara, Walter Mondale, Edmund Muskie, Elliot Richardson, Donna Shalala, and Alexander Trowbridge—is weighted heavily toward people who developed programs during the 1960s and 1970s, rather than those who tried to change them in the 1980s.

Thus, despite the prominence of the members, their manifest abilities, and their unquestioned integrity, none of them was critically involved in the disputes about the purposes of government that divided President Reagan from the Congress, and that continue to divide the American people from official Washington. Specifically, the Commission consistently favors the growth of government, notwithstanding the persistent opposition of American taxpayers to increased federal spending. By repeatedly electing presidents who promise to restrict government's role, the Ameri-

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can people would appear to be sending Washington a message; this Commission studiously ignored it.

The Commission rightly notes that "opposition to specific policies of government has contributed to a lack of respect for the public servants who struggle to make the policies work." It follows, however, that civil servants depart from a nonpartisan role when they commit themselves to defending programs that their executive-branch superiors have been elected to curtail or to eliminate. When the American people repeatedly vote for presidential candidates who pledge to reduce government spending and to cut programs, they manifest a dissatisfaction with government that cannot be remedied by additional "civic education" about the functions of civil servants. When Congress rejects a pay raise because of overwhelming public pressure, officials who persistently demand such a raise can hardly be called "responsive." And public servants who persistently disparage "political birds of passage" should not be surprised when political appointees grow to distrust bureaucrats who too readily identify their agencies' programs—regardless of their failings—with the national interest.

When all is said and done, the legitimacy of public programs depends upon the consent of the governed. Although both George Bush and Michael Dukakis pledged to move the country "forward" during the last campaign, most people understood that they would steer in different directions. The apparent Republican lock on the electoral college and the persistent Democratic majorities in Congress indicate that the American people are uncertain about the proper direction for our nation. Defining the national interest is the fundamental political question; in the absence of an agreement upon it, public servants who are caught in political tides cannot expect to be comfortably isolated from the storms.

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